THE LAW QUARTERLY REVIEW.

No. LIX. July, 1899.

NOTES.

SOME of our readers and correspondents appear to have overlooked the notice as to the change in our date of publication which appeared in the January number. We therefore beg to repeat that the LAW QUARTERLY REVIEW is now—for the reasons of convenience then stated—issued on the *fifteenth* day of the month of which it is dated.

The effect of the two decisions of the Court of Appeal in the picketing case of *Lyons* v. *Wilkins*, '96, 1 Ch. 811, '99, 1 Ch. 255, has been to add a new auxiliary jurisdiction by way of injunction, in aid of a criminal statute, to the sufficiently various duties of the Chancery Division. See *Charnock* v. *Court*, '99, 2 Ch. 35. We cannot discuss in the compass of a brief note whether this is on the whole a good thing or not, but we do not believe it was in the contemplation of Parliament when the Conspiracy and Protection of Property Act, 1875, was passed.

'If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. . . . There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, i. e. over the subject-matter or over the persons brought before them. But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense, i. e. its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country.'

These words from the admirable judgment of Lindley M.R.

exactly sum up the effect of *Pemberton* v. *Hughes*, '99, 1 Ch. 781, 68 L. J. Ch. 281, C. A., which we understand will not be the subject of a further appeal.

Pemberton v. *Hughes* will be a leading case. It carries out to its full and legitimate result the principle implied in, if not absolutely established by *Vanquelin* v. *Bouard* (1863) 15 C. B. N. S. 341, and *Doglioni* v. *Crispin* (1866) L. R. 1 H. L. 301, viz. that where the Courts of a foreign country have according to the principles maintained by English tribunals jurisdiction to pronounce judgment upon a given matter and between the parties whose interests are involved, i. e. are, from an international point of view, Courts of competent jurisdiction, a judgment by a Court of that country will be in England treated as conclusive even though the judgment may be grounded upon some mistake of the Court as to municipal procedure or law. The logical maintenance of this principle no doubt may occasionally lead, as pointed out by the Master of the Rolls, to the apparently paradoxical result that the decree of a foreign Court is here treated with more respect than it is entitled to in the country where it was pronounced. But the paradox is merely apparent, and the doctrine stated with singular clearness in *Pemberton* v. *Hughes* is a legitimate application of what has been termed the principle of effectiveness (see Dicey, Conflict of Laws, p. 40).

The Royal College of Surgeons must, it appears, as far as the Court of Appeal can decide the matter, pay the so-called corporation duty (*In re Royal College of Surgeons of England*, '99, 1 Q. B. 871, 68 L. J. Q. B. 613, C. A.) imposed by the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, whilst the Institution of Civil Engineers (*Inland Revenue Commissioners* v. *Forrest* (1890) 15 App. Cas. 334) is not liable to the tax. We have little doubt that the decision of the Court of Appeal, consisting of such judges as A. L. Smith, Collins, and Romer L.JJ., is right, and we have equally little doubt that the members of the College of Surgeons feel that they have a grievance. What ground of national policy can there be for giving greater immunities to the Institution of Civil Engineers than to that equally respectable and far more useful body, the College of Surgeons? Though the decision of the Court is, we incline to believe, right and justified by the wording of the enactment on which it is grounded, we confess that the line which divides the case of the Surgeons from that of the Civil Engineers is a very fine one, and the distinction between the two hard to justify on grounds of expediency.

In truth *In re the Royal College of Surgeons of England* raises in a pointed form a question to which attention has often been called in the pages of the LAW QUARTERLY REVIEW.

Would it not be a public benefit if the greater number of the exemptions contained in our Taxing Acts were repealed?

These exemptions are open to at least three objections.

First, they leave a feeling of unfairness on the minds of persons who fall just outside the line of exemption.

Secondly, they give rise to an immense amount of litigation.

Thirdly, they do no substantial good whatever.

If the public would lose a little by taxation which diminishes the resources of institutions existing for a public object, the public would, on the other hand, gain something by a slight increase in the public revenue, and by the simplification of the Taxing Acts. Loss and gain exactly balance one another. The only persons who profit by the exemptions from taxation are the limited though most respectable body of lawyers who derive a good business from Revenue cases.

'It is not the act of God to leave a heap of stones on a highway,' the late Lord Blackburn was long ago reported (not in an authorized report) to have said in the Court of Queen's Bench. It is, however, the act of the district council who are bound to repair the road; at any rate they cannot escape liability to a man who falls over the stones in the dark, though they have not done the work by their own servants but employed a contractor: *Penny* v. *Wimbledon Urban Council*, '99, 2 Q. B. 72, 68 L. J. Q. B. 704, C. A., affirming the decision of Bruce J., '98, 2 Q. B. 212, 67 L. J. Q. B. 754, and approving his statement of the law. Persons and bodies undertaking work which, without known and reasonable precautions, is dangerous to the public, must be held to warrant that those precautions are carried out, not merely to contract for the work with some one who is apparently competent.

A, a shopkeeper, insures his stock-in-trade against burglary and housebreaking, and in the policy the risk against which he insures is defined to be loss of property 'by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate,' viz. a shop, No. 78, Strand. In the early morning, before business hours, a thief opens the front door, enters the shop, breaks open a locked-up compartment or showcase within, which forms a portion of the shop, and steals therefrom the insured property. Is *A* entitled to be compensated for his loss by the insurance company?

This is the question raised by *In re George & Goldsmiths &c. Insurance Association*, '99, 1 Q. B. 595, 68 L. J. Q. B. 365, C. A. The Divisional Court, consisting of two very eminent judges, answer the question in the affirmative. The Court of Appeal, consisting of three eminent judges, answer it in the negative. Which has decided rightly? From a legal point of view this inquiry can be determined decisively only by an appeal to the House of Lords. From the point of view of common sense one may fairly say that neither answer is in itself unreasonable. The matter to be determined is the meaning of the parties to the contract, but they have used language which, when applied to circumstances, which neither party, it is probable, exactly anticipated, turns out to be ambiguous. In such circumstances it is impossible for a Court to give a decision which shall be clearly and obviously right. The difficulty arises not from the over-refinements of lawyers, but from the impossibility of framing language which should clearly meet every possible case for which the parties ought to have provided. The only permissible doubt is whether in consideration of the admitted intention of the shopkeeper to protect himself against loss by burglary, and of the acceptance of payments by the company, a Court called upon to interpret the contract of insurance ought not to make every presumption against the company which is not absolutely inconsistent with the terms of the contract. There is a good deal of common sense in the remark of Kennedy J.: 'This is a policy expressed to be against loss by burglary and housebreaking, and, seeing that those words are fairly well understood, I think the policy cannot be read so as to deprive the assured of protection in the way contended for by the respondents,' i. e. the company. On the other hand, it is very difficult to get over the words of the contract, which require 'actual forcible and violent entry upon the premises' in which the insured goods are situate as a condition of the risk attaching, and seem purposely to exclude the legal definition of burglary and housebreaking by the qualification 'as hereinafter defined.'

A clearly cannot maintain an action against *X* for a wrong committed by *Y*, or against *Y* for the wrong committed by *X*. Hence it would seem inevitably to follow that *A* cannot maintain an action against *X* and *Y* as joint wrong-doers where *X* and *Y* are guilty, if at all, only of a separate wrong done to *A*. This almost self-evident principle of rational procedure may now be considered finally established by *Sadler* v. *The Great Western Railway*, '96, A. C. 450, 65 L. J. Q. B. 462, which has been followed by *Thompson* v. *London County Council*, '99, 1 Q. B. 840, 68 L. J. Q. B. 625, C. A.

Two points are noticeable. First, the oddity of there being any doubt as to a point which, independently of the language used in some rules of Court, appears to be self-evident.

Secondly, the fact which, owing to a reaction against the extreme technicality of the art of pleading, was, when first the Judicature Acts came into force, apt to be forgotten, viz. that rules of pleading often rested at bottom on the application of sound logic to actual facts.

There is no part of the law which ought to be made more perfectly clear, and seems by its nature to be better adapted for codification, than the rules as to the limitation of actions; they are the creation of statute, and might with great advantage be enacted and exhibited in a tabular form, as was done more than twenty years ago in British India, yet there are few branches of the law which more often cause perplexity, not only to laymen but to eminent judges. *A* brings an action against *X*, who pleads in substance that the action is barred by the lapse of six years under the Limitation Act, 1623. The Chief Justice holds that the case comes not within the Limitation Act, 1623, but within the Real Property Limitation Act, 1874, and that *A*'s claim is therefore not barred by the mere lapse of six years and cannot be barred until the lapse of twelve years. The Court of Appeal—and a very strong Court—has reversed the judgment of the Court below, and has held that the case comes within the Limitation Act, 1623, and the plaintiff's claim is barred by the lapse of six years (*Barnes* v. *Glenton*, '99, 1 Q.B. 885, 68 L. J. Q. B. 502, C. A.). There is, however, no reason to blame either the Lord Chief Justice or the Court of Appeal. The language of the Real Property Limitation Act, 1874, taken together with the cases purporting to interpret that language, has reduced the law as to the limitation of actions, where money sought to be recovered is charged upon land, to a state of confusion. The rule laid down by the Court of Appeal in *Barnes* v. *Glenton*, and before this by Stirling J. in *Firth* v. *Slingsby*, 58 L. T. 481, simplifies matters a good deal, since it establishes that the Real Property Limitation Act, 1874, is entirely a restrictive statute, and does not affect at all actions for simple contract debts; these now, as before 1874, fall within the Limitation Act, 1623, and are therefore barred by the lapse of six, and not of twelve years. But it is too late for judicial legislation to put the limitation of actions on a perfectly sound foundation. What is needed in this matter is a Codification Act.

It is a remarkable illustration of the conservatism, the slow evolution of English law, that it should have taken 400 years and more to work out the rational theory of trustees' liability. It might have been supposed that at an early, if not the earliest, stage of the history of trusts, the Court, when called upon to pronounce on a trustee's culpability, would have asked itself the question, 'Has he—the impugned trustee—acted honestly and reasonably?' But no! the question has been, Has he transgressed the letter of the trust? If he has, then to judgment, however honest, however reasonable, however venial his error. The Master of the Rolls might well say that such a state of the law shocked one's sense of humanity and fairness (*Perrins* v. *Bellamy*, '99, 1 Ch. 79, 67 L. J. Ch. 649); but Equity had tied her own hands by a long course of decisions, and nothing but a *Deus ex machinâ* in the shape of an Act of Parliament (the Judicial Trustees Act, 1896) could set her free.

X & Co., the sellers, have agreed to sell ten tons of copper to *N*, the buyer. They send him in a letter a bill of lading for the copper, accompanied by a draft, and send the bill on the terms that if *N* keeps the bill of lading, and thereby accepts the copper, he is to accept the draft. *N* fraudulently retains the bill of lading without accepting the draft. He thereupon hands over the bill of lading to *A* in return for the price of the copper. *A* takes the bill of lading and pays *N* the price of the copper in absolute good faith, and without any knowledge of the fraud committed by *N*. *X* & Co., hearing that *N* is insolvent, which is the case, stop the copper *in transitu*. *A* brings an action against *X* & Co. to recover damages for the non-delivery of the copper. These for our present purpose are the essential facts of *Cahn* v. *Pockett's Bristol Channel &c. Co.*, '99, 1 Q. B. 643, 68 L. J. Q. B. 515, C. A.

'The crucial question in this case is whether the buyer obtained possession [i. e. actual custody, Factors Act, 1889, s. 2, sub-s. 2] of the bill of lading with the consent of the sellers.' ('99, 1 Q. B. 657, judgment of Collins L.J.)

The question is a hard one to answer. Mathew J. has replied to it in the negative. The Court of Appeal has replied to it in the affirmative.

The difficulty arises, as in most cases with regard to possession, on a question of animus, or intention, which in this case is shifted, but not abolished, by the statutory definition of possession as actual custody. There is no doubt that the bill of lading was, as a physical fact, in the actual keeping or custody of *N*. There is no doubt that it came into *N*'s keeping or custody through the

voluntary act of *X* & Co., the sellers, and therefore, in one sense of the words, 'with their consent.' But it is, on the other hand, certain that *N* retained possession of the bill of lading under such circumstances that he was bound to return it to *X* & Co., and therefore that, from the moment that *N* declined to accept the draft, he held possession of the bill, not with, but against the will of *X* & Co. Can we then say that he had at any time actual custody of the bill with the consent of the sellers? It is a nice question, but we incline to the opinion that the decision of the C.A. is right. At the moment when the bill of lading reached the hands of *N*, it was in his actual custody with the consent of the owners. The effect of this undisputable fact is not lessened by the subsequent fraud of *N*. He ceased no doubt to have lawful possession of the bill, but it came into his custody with the consent of *X* & Co. It was therefore their conduct which, though perfectly innocent, enabled *N* to commit a fraud, and the very object of the Sale of Goods Act, 1893, s. 25, sub-s. 2, when read together with the Factors Act, 1889, is to make the seller liable for the loss caused by a fraud which could not have been carried out unless he had placed a document of title in the hands of a man who turns out to be a rogue.

An infant's contract of service will not bind him unless it is reasonable and for the infant's benefit. But this does not mean that every single term in the agreement must be for the infant's advantage. A clause suspending payment of wages during a 'turn-out'—which includes a lock-out due to the master's own act—has been held bad: *Corn* v. *Matthews*, '93, 1 Q. B. 310, 62 L. J. M. C. 61. But an exception confined to stoppage of business through accident beyond the control of the master is good: *Green* v. *Thompson*, '99, 2 Q. B. 1, 68 L. J. Q. B. 719. The master is bound to do his best to find work and instruction for the apprentice, not to warrant absolutely that work shall not be interrupted.

Re Tiedermann and Ledermann Frères, '99, 2 Q. B. 66, is a case of some novelty and curiosity. An agent in Berlin, holding a general authority to make purchases and sales for a principal in New York, made a sale of wheat by his principal's express instructions. Afterwards he repurchased the same wheat at an advanced price, and sold it again at a further advance, and still in the principal's name; but in fact he meant to deal on his own account, using the principal's name because the principal was in good credit and he was not. It was held that neither the existence of this intention nor the discovery of it by the last buyer before ratification by the

principal prevented the principal from ratifying and adopting the contract, as in fact he did. *Bolton Partners* v. *Lambert*, 41 Ch. Div. 295, has been freely criticized: but it has stood ten years, and on the whole it is better that the Court should not cut down its consequences by refined exceptions.

Is it a crime to tell fortunes?

Georgina Jones, who is or has been an occupant of the gaol at Manchester for 'pretending or professing to tell fortunes' (*R.* v. *Entwistle, ex parte Jones*, '99, 1 Q. B. 846, 68 L. J. Q. B. 580), will, no doubt, tell us off-hand that in England it is a crime to be a prophetess.

But then Georgina Jones has, we may assume, never meditated much upon many nice questions which perplex lawyers. Is it, for example, a crime to tell a young lady's fortune at a bazaar where the prophet who utters oracles, and the young woman who pays for them, does not believe in fortune-telling? One may answer without much hesitation that no crime has been committed. (Compare *Lee or Smith* v. *Neilson* (1896) 23 Rettie (Just. Cases) 77, and *Monck* v. *Hilton* (1877) 2 Ex. D. 268, 276.)

Does a gipsy, again, 'pretend' to tell fortunes and therefore offend against the law when she and the simpleton who consults her both bona fide believe in her predictive power?

We incline to think that she is a criminal (*Monck* v. *Hilton* (1877) 2 Ex. D. 268).

What, further, is the legal position of the mediums, spiritualists, palmists, and the like, who drive a thriving trade on the fees paid them by educated ladies and gentlemen? Are they all rogues and vagabonds liable to be sent to prison? We incline strongly to the belief that they each and all of them stand in this unsatisfactory position and might, were the law strictly enforced, be compelled to exchange their comfortable consulting-rooms for cells in Her Majesty's gaols (see *Penny* v. *Hanson* (1887) 18 Q. B. D. 478; *R.* v. *Justices of Middlesex* (1877) 2 Q. B. D. 516).

But here we come across the two fundamental questions which until they are answered must render doubtful the whole of the law with regard to the practice of fortune-telling, astrology, and the like.

First. Does the law punish e. g. fortune-telling as an offence in itself, or does it punish only frauds connected with the pretence of fortune-telling?

On the one view, which we may safely assume governed the whole law against witchcraft, the bona fides of the fortune-teller

certainly does not lessen and perhaps aggravates the offence. Witches used to be burned not because they pretended to practise witchcraft, but because, as was then believed, they really did practise witchcraft. On the other view, which is possibly the foundation of the existing law, the bona fides of the fortune-teller is or ought to be a defence against punishment. A person commits a fraud—to put the matter broadly—when he tells a lie and knows it to be a lie. A person who makes a false statement, believing it to be true, may be guilty of folly but he is not guilty of fraud.

Secondly. Does the law authoritatively lay down that a belief e.g. in fortune-telling or astrology is so patently absurd that no man or woman can hold it in good faith, and therefore that a fortune-teller is *ipso facto* a cheat?

This would seem to be the doctrine maintained by some judges.

When one Penny was convicted under the Vagrancy Act, 1824 (5 Geo. IV, c. 83), for pretending to tell fortunes by means of astrology, Denman J. said judicially, 'in this case *res ipsa loquitur*. It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by knowing the hour and place of his birth and the aspect of the stars at such time. We do not live in times when any sane man believes in such power' (*Penny* v. *Hanson*, 18 Q. B. D. 478, 480). This is the language of manly common sense, but it hardly corresponds with the actual facts of the day. We suspect that there are scores of persons, and they too persons who are called educated, who believe in palmistry and are ready to believe in astrology.

One thing is certain. The time has come when the law with regard to fortune-telling, palmistry, astrology, and the like, should be made clear.

It is possible, and likely enough it may be advisable, to enact that what used to be called occult arts shall not be practised at any rate for money, and that the person, whether a well-to-do palmist or a gipsy beggar-woman, who practises such arts for gain shall be duly punished.

It is possible, and again it may be advisable, to enact that whilst any man or woman who likes may tell fortunes for gain without incurring any penalty, any one who makes fortune-telling a means of fraud shall be punished.

What is hardly tolerable is that the law should be uncertain, so that a competent judge is compelled to say 'I think it unnecessary to decide whether the mere telling of fortunes is an offence within the Vagrancy Act, 1824,' for the uncertainty of the law leads

to practical injustice. The palmist who takes a guinea from a lady drives a thriving trade, the gipsy who takes sixpence from a maid-servant is sent to gaol. Certainly there is some reason to presume that the lady who pays a guinea is not deceived, and the maid who pays sixpence is. The fashionable palmist can say truly or at least plausibly, 'What I profess is to study character in hands, which is as lawful as studying it in faces, though not quite so easy, and to tell my clients the results of that study, and also the results, in the way of prediction, of applying the rules—known and published rules—of palmistry to their particular lines of life, and so forth. I claim no occult powers and express no opinion as to the validity of the so-called science of palmistry. The client pays for the game, and I cannot prevent him or her from taking it seriously if so disposed.' But still will such a distinction warrant the difference between Bond Street and Bridewell?

Brown v. *Patch*, '99, 1 Q. B. 892, 68 L. J. Q. B. 588, belongs to that long line of cases which deal with what may be called the casuistry of betting and which threatened at one time to involve the Courts in the attempt to determine the logical or metaphysical problem, What is a 'place'? But *Brown* v. *Patch*, taken together with *Powell* v. *Kempton Park Racecourse Co.*, '99, A. C. 143, 68 L. J. Q. B. 392, gives a striking example of the way in which the common sense of English judges enables them to deduce by degrees even from the ambiguous language of an ill-drawn statute a substantially clear and intelligible rule. The difficulty that they had to face is that the Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1 & 3, imposes a penalty on 'the owner or occupier of any house, room, office, or other *place*,' who knowingly permits the same to be used for purposes of betting. Now if the word 'place' be used in its most extensive sense, the enactment would prohibit almost all betting, or, at any rate, all systematic betting, since every bet must be made in some 'place,' whilst, on the other hand, if a very narrow interpretation be given to the word 'place,' the Act of Parliament would be almost nullified. The Courts have at last, after wavering backwards and forwards between the wider and narrower senses of the term 'place,' arrived at what, at any rate, is an intelligible rule. The statute, they hold, is directed against betting places, not against betting persons. It does not prohibit persons using a place by going there and meeting and betting with each other. It does not forbid keeping a place where persons may meet and bet with each other. It does not forbid the carrying on the business of betting with any one who will bet with you. What it does

forbid is the carrying on the business of keeping an office or place to which people may come and bet with you (see '99, 1 Q. B. 899, judgment of Channell J.). Speaking in general terms, the place mentioned in the Act must be to some extent *ejusdem generis* with house, room, or office. You have a place directly a definite localization of the business is effected. To put the matter broadly, the Act prohibits the keeping of any kind of betting office, or of anything like a betting office. It does not prohibit betting or public meetings on racecourses or otherwise, the object of which is to make bets. The Betting Act, 1853, is in reality accurately described by the longer title contained in the Act itself, namely, An Act for the Suppression of Betting Offices.

It is easy to understand how reformers who rightly enough hate betting, and no doubt would be glad to put down public races, have fancied that they could make use of the Betting Act, 1853, for the suppression of what after all is no better than a particular form of public gambling. But lawyers, of whom there are many, who have never been to racecourses, and have never made a bet on the result of a race, may feel well satisfied at the refusal of the Courts to apply the wide language of the Betting Act, 1853, to a purpose for which the Act was not passed. The Act was aimed at betting houses; it was not aimed at betting. It is quite arguable that the time has come when the Legislature should go a step further and take steps to put an end to public betting at races, or even to public races themselves. But this innovation or reform must be carried out by Parliament, not by the Courts. The judges are perfectly right in acting on the principle that an Act passed in 1853 cannot in 1899 be held to have a sense which it was certainly not meant to bear at the time when it was passed.

What kind of interest is a possibility of reverter on the failure of a fee simple conditional? Few lawyers would give an answer to this question off-hand, and fewer would think it likely to call for decision; but North J. had to decide it in *Pemberton* v. *Barnes*, '99, 1 Ch. 544, 68 L. J. Ch. 192. A strict settlement in the usual form included some copyhold of a manor in which there was no custom to entail. The first person named as tenant in tail male therefore took in that copyhold a fee simple conditional, as before the Statute *De Donis*. He died without having had issue; the tenant for life was then dead, having devised his residuary real estate by will. This tenant for life was the only son of the original settlor, and it was common ground that the ultimate interest of the settlor, if

descendible (as to which the Court had no doubt), had passed to him. Whether that interest were also devisable at common law was disputable and well disputed. North J. cut the knot by holding that the possibility of reverter on the conditional fee was a right of entry within the meaning of section 3 of the Wills Act, 1837, and therefore devisable whatever the pure common law might be. Some successor of Blackstone will wonder why this reforming generation allowed such questions to be still possible.

The decision in *Nunn* v. *Fabian* (1865) L. R. 1 Ch. 35, 35 L. J. Ch. 140, that payment of increased rent by a yearly tenant is such part performance as will dispense with a signed agreement under the Statute of Frauds, and let in parol evidence of the terms on which the new letting was made, has been criticized but never overruled. In *Miller* v. *Aldworth Lim.* v. *Sharp*, '99, 1 Ch. 622, 68 L. J. Ch. 322, Byrne J. has followed it as a subsisting and leading authority, and adopted the reason formerly given why payment of rent will do and payment—in part at all events—of purchase-money will not; namely that a payment of rent ear-marks itself, so to speak, and increase of rent can be referred only to some new agreement, whereas payment of purchase-money is in itself merely the payment of a lump sum by *A* to *B*, requiring further evidence to show what the payment was for.

A man who goes through a ceremony of marriage with his deceased wife's sister in this country had better not make a settlement in the ordinary form. If he does, any trust for the so-called wife's benefit in which the word 'widow' or 'widowhood' is used will be void, both as being founded on an unlawful consideration, and because, not having been a lawful wife, she will not be a lawful widow: *Phillips* v. *Probyn*, '99, 1 Ch. 811, distinguished from *Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275, because here the Court was not asked by a *particeps criminis* or his representative to set aside the settlement, but was asked by the trustees whom they ought to pay. Meanwhile it seems a little odd that such terms as 'concubinage' should be applicable in our Courts to marriages which are absolutely lawful in every other Protestant nation, and have never been absolutely unlawful by the law and discipline of the Roman Church.

The Law Reports for this quarter contain at least seven cases on the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), and the July number brings up the total to about a dozen. This fact throws considerable doubt on the validity of one of the grounds on

which the Legislature was induced to sanction a fundamental change in the principles regulating an employer's liability for accidents to his workmen. It was urged with great plausibility that the alteration would to a great extent relieve workmen from the necessity of enforcing their rights by action. Experience in the working of the Act cannot be said to justify this anticipation.

Critics, however, who suggest that the number of reported actions for compensation is a proof that the Act has failed in one of its main objects, go beyond any conclusion the facts warrant. Whenever a fundamental change is introduced into any branch of the law, the immediate result must be an increase of litigation. It is only by experiments in the Law Courts that the exact result and extent of a new enactment can be tested, and as long as English human nature remains what it is, workmen who may gain by a broad interpretation of an Act will attempt to get its meaning extended by the judges, whilst employers who wish to lessen their liabilities will contend for the narrowest possible interpretation. After a time, however, the meaning of each important provision will become fixed. Experimental actions will cease because every one can foretell the result of the experiment; in other words, Parliamentary legislation will always for a time be followed by active, though subordinate, judicial legislation. But judicial legislation will by degrees decrease, provided only that Parliament can abstain from further alterations of the law.

Can a servant be dismissed without notice for a single act of forgetfulness?

Most persons will answer 'Certainly not,' and this answer would in ninety-nine cases out of hundred turn out to be practically correct. No one, for example, could in general dismiss a footman simply because he forgot to put a letter in the post in time for the evening collection.

Yet *Baster* v. *London and County Printing Works*, '99, 1 Q. B. 901, 68 L. J. Q. B. 622, establishes that circumstances may exist under which a single act of forgetfulness may justify immediate dismissal, and an example given by Darling J. shows the reasonableness of the rule. 'Take the case of a signalman on a railway who does not put the signal at danger when he ought to do so. Nobody would suggest that his omission was the result of anything but forgetfulness; but could it be said, in view of what might be the consequences, that it was not a serious neglect of his duty?' But if it is such serious neglect it clearly might justify the instantaneous discharge of the signalman. Here we get to the principle of the bottom of the whole matter. A servant may be dismissed for

breach of duty, and therefore for gross negligence. Whether forgetfulness does amount to such negligence is in each case a question of fact. No servant undertakes never to forget an order. To err, we all know, is human, and therefore mere error is not of itself breach of duty. But when a servant knows that the doing of a particular thing is of vital importance to his employer, his forgetfulness thereof may be equivalent to a deliberate breach of duty. We have all forgotten to put letters into the post, but if a clerk knew that his omission to post a letter might cause his employer the loss of £10,000, and this fact had been impressed upon the clerk, his forgetfulness to post it might well justify his discharge.

Directors are the pivot of the company system. They are the agents of the company put there to protect and promote its interests, and only on the assumption that the shareholders may repose implicit trust in their loyalty can the co-operative system be successfully worked. The mischiefs which arise under the present system will be found to be traceable almost without exception to the fact that the directors have abdicated their duty to the company, and suffered themselves to become, in Lord Justice James' contemptuous language, 'the hired retainers' of persons whose interests are inimical to those of the company. In view of this fact, it is incumbent—nay, imperative—on the Court to exact *uberrima fides* on the part of directors, and to fortify their integrity when, like Bob Acres' courage, it begins to ooze away. If, for instance, they are inviting shareholders to a meeting to sanction a scheme of reconstruction, and they have a personal interest, say as debentureholders, in the scheme, the knowledge of which may—not must, but may—affect its acceptance by the shareholders, that interest must be disclosed in the notice convening the meeting (*Tiessen* v. *Henderson*, '99, 1 Ch. 861, 68 L. J. Ch. 353). Then the shareholders are put on their guard, and apply their own minds to the merits of the scheme, or if they do not it is their own fault. It makes no difference that in the particular instance the directors meditate no abuse; other directors may. It is the means to do ill deeds makes ill deeds done.

When limited liability was before Parliament the problem was how to bring home notice of the limitation to persons dealing with the company. Given such notice there was no hardship, because it was open to persons to trust the company or not as they liked. The problem was solved, as everybody knows, by the Legislature adopting Lord Bramwell's suggestion of tacking on 'Limited' to

the company's name, and obliging the company to give every notoriety to it by painting it up on its premises, putting it on bills and notes, &c. But the Legislature did not stop here; it took steps to enable the person dealing with the company to know what its financial status was, and to this end it required the company to keep a register of its members—accessible to the public—setting forth certain particulars, saying in effect to the world at large, 'Here are the persons, these are the assets, the paid-up capital, the uncalled capital to which you may trust.' This is why the Courts—pursuing the policy of the Legislature—have consistently refused to release a member from liability as a contributory after the rights of creditors have intervened, despite the fact that the member has been induced to take his shares by misrepresentation and fraud. 'It is difficult,' as Lord Cairns said, 'to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position;' doubly difficult, seeing that the Legislature itself has invited creditors to trust to it. The question still remains, What is the point of time at which the right to rescission of a voidable contract is barred, the making of the winding-up order, or the presentation of the petition? If any doubt on the subject existed it may now be considered dispelled by *Whiteley's* case ('99, 1 Ch. 770, 68 L. J. Ch. 365), fixing the date at the presentation of the petition, the commencement of the winding-up. The new Companies Bill goes further: it makes it not enough for the shareholder to have instituted proceedings for rescission before presentation of the petition; he must, to be relieved, have actually got *judgment* for rescission before the commencement of the winding-up.

The last scene in the *cause célèbre* of *Salomon* v. *Salomon & Co.* was enacted before Kekewich J. in *In re Raphael* ('99, 1 Ch. 853, 68 L. J. Ch. 309), and it maintains the interest of the piece to the end. Litigation had resulted in reducing Mr. Salomon from comparative affluence to penury, that is, he was able to swear that he was not worth more than £5 except his wearing apparel, and under these circumstances the House of Lords gave him leave to appeal *in formâ pauperis*, much as the authorities at Monte Carlo give a viaticum to a ruined gamester. The appeal, as everybody knows, went in his favour, and the party and party costs, limited according to the rule in *Johnson* v. *Lindsay & Co.* ('92, A. C. 110), were duly paid him by the respondents. Then came the question of that margin of expenses in litigation known as solicitor and client costs. In the Supreme Court no such question can arise. A pauper has

counsel and solicitor assigned him, and the terms are no remuneration for either of them; hence the pauper, where successful, can only get out-of-pocket costs from the defendant; but in the House of Lords it is different. There there is no such assignment binding counsel and solicitor to accept no remuneration. The pauper appellant, if he wins, as he did in *Salomon* v. *Salomon & Co.*, can, it is true, only get his out-of-pocket expenses out of the respondent under the decision in *Johnson* v. *Lindsay & Co.*; but that does not conclude the question as between solicitor and client. On principle there is nothing, as Kekewich J. pointed out, to prevent a pauper appellant in the House of Lords retaining a solicitor, and if so, why should not the ordinary incidents attach to the relation? Why is the Court to invent a special contract derogating from the solicitor's rights? No harm is done, because if the pauper loses he is not worth suing on the retainer: if he wins—*ad uberiores fortunas pervenit*—why should he not pay?

X, by fraudulent misrepresentation, induces *A* to join him in doing a criminal act, and *A* in consequence suffers heavy loss. Has *A* a right of action against *X* for the damage he has incurred?

The answer clearly is that *A* has no right of action. But to this general rule *Burrows* v. *Rhodes*, '99, 1 Q. B. 816, 68 L. J. Q. B. 545, introduces at least one exception. It is this: if *X* by his fraudulent misrepresentations of fact induces *A* to believe in the existence of a state of things under which the act which *A* is thereby induced to do would, in truth, have been neither illegal nor immoral, then *A* may have a right to recover damages from *X* for the damage resulting to *A* from *X*'s fraud.

The exception, be it noted, is a very narrow one, a good deal narrower in fact than might be inferred from a cursory perusal of Mr. Justice Grantham's judgment. His vague language needs to be limited by the accurate statement of the law contained in the judgment of Kennedy J. ('99, 1 Q. B. 829, 830).

A will not have a right of action against *X* if *X* merely misrepresents the state of the law. An Englishman at any rate is presumed to know the law of England.

A, again, has probably no remedy against *X* if the act he does is on the face of it morally wrong, even though *X*'s fraudulent statement should have induced *A* to believe that some circumstance did not exist which was necessary to make this immoral act a crime.

Then, lastly, we may conjecture, though this is not certain, that *A* must, in order to maintain an action, show that the belief in the innocence of his conduct which he was induced to entertain

by *X* was a belief which might, under the circumstances, reasonably be entertained by a man of ordinary common sense. It would be a strong thing to extend the rule in *Derry* v. *Peek* to excuse criminal offences.

The true result, in short, of *Burrows* v. *Rhodes* seems to be, broadly stated, that where *A*, in consequence of *X*'s fraudulent misrepresentation of fact, does an act which involves no moral guilt on his part, he may, even though the act turn out to be a crime, maintain an action against *X* for damage ensuing thereby to *A*, i. e. for damage which is ultimately and wholly caused by *X*'s fraud.

Moss v. *Hancock*, '99, 2 Q. B. 111, 68 L. J. Q. B. 657 is a peculiar case. It shows that a coin capable of being used as current legal tender is also capable, at all events if it has never been circulated as current money, not only of being stolen, but also of being afterwards sold and bought as a specific chattel by way of a curiosity, and that, if so, the true owner may have restitution under the Larceny Act. The coin in question was a Jubilee five-pound piece. Probably none of these pieces have passed into currency, so the decision may have some general interest for collectors and dealers.

The undischarged bankrupt and his after-acquired property show the law adapting itself to the practical exigencies of life. The chief aim of all law is to make good citizens; and it does not conduce to that end—so English law thinks—or to the encouragement of honest industry, to strip an undischarged bankrupt of his earnings the moment he makes any, and hand them over to his creditors; neither is it fair on persons dealing with him bonâ fide. To carry out this policy the Court has had to get over some awkward statutory stiles—the vesting sections 44 and 54 of the Bankruptcy Act, 1883; and it has narrowed down the trustee's title to this, that the trustee may intervene and claim after-acquired property if a bonâ fide purchaser for value has not been beforehand with him. When the after-acquired property takes the form of a chose in action, such as costs earned by a bankrupt solicitor, the plot thickens, and the doctrine in *Dearle* v. *Hall* has, it seems, to be engrafted on that of *Cohen* v. *Mitchell* (*In re Beall*, '99, 1 Q. B. 688, 68 L. J. Q. B. 462), that is to say, it is a case of which claimant—trustee in bankruptcy, or purchaser for value—first gives notice of his claim to the debtor. Altogether—looking at the versatility of the genus undischarged bankrupt—the trustee's chance of getting hold of after-acquired property is a rather remote one. If he does, it is only the remnant of it, for

the bankrupt is entitled to deduct a reasonable allowance out of it for his own and his family's maintenance. Times are finely changed since a bankrupt was actually hanged for concealing some of his property.

Though a shipowner is, under English law, freed from liability for damage caused by a collision whilst his ship is by compulsion of law under the charge of a pilot, he is not protected from liability by the mere fact that he is compelled by the law of a country within the jurisdiction of which his ship has come to take a pilot on board unless the charge of the ship passes from the master to the pilot. This is the point illustrated by the *Prins Heudrik*, '99, P. 177. The judgment delivered by Gorell Barnes J. places the legal effect of compulsory pilotage on its right basis. A shipowner whose vessel is in charge of a pilot is freed from liability for the negligent navigation of his ship, not because he has a pilot on board nor because he is compelled by law to have a pilot on board, but because he is compelled by law to transfer the charge of his ship to an official, viz. the pilot, whom the law forces him to employ and over whom he has no control. If the ship, in spite of the pilot's presence, remains in charge of the shipowner's servant, the shipowner is liable for damage caused by his servant's negligence.

It is not often that a judge expresses such undisguised dissatisfaction with the law as Romer L.J. did in dealing with the doctrine of retainer in *Davies* v. *Parry* ('99, 1 Ch. 602, 68 L. J. Ch. 346). The doctrine is indeed one of those antiquated pieces of furniture from the law's lumber-room which shows very dusty and out of place among the smart appointments of the modern law, but there it is, sanctioned by centuries of authority, and there is no getting rid of it by judicial artifice. On the contrary the doctrine seems to ramify. It is not affected, for instance, by the circumstance that the legal personal representative did not acquire the character of personal representative until after judgment for general administration, nor does the legal personal representative lose his right of retainer out of money paid into Court because he himself applies for the order under which the money is so paid in *In re Langley* (68 L. J. Ch. 361): nor, again, does the mere fact of payment into the hands of an official receiver acting as trustee under an administration order in bankruptcy of assets collected by an executor bar the executor's right of retainer, any more than payment into Court (*In re Rhoades*, '99, 1 Q. B. 905, 68 L. J. Q. B. 536, since affirmed). What specially conflicted with Romer L.J.'s sense

of the fitness of things was the right of retainer being exerciseable after judgment for general administration, which prevents a legal personal representative from paying one creditor in preference to another; but that retainer does not depend on the right to prefer is evident from the remarks of James L.J. in *Lee* v. *Nuttall*. On what principle it does depend it is very difficult to say—whether on the privilege of possession, or on inability on the part of an executor—under the old law—to sue himself. Perhaps it is best to adopt Burke's advice for the study of the constitution, and venerate where we cannot understand.

Suum cuique tribuere, how difficult it is as illustrated in the specific performance jurisdiction! (*Hope* v. *Walter*, '99, 1 Ch. 879, 68 L. J. Ch. 359). It seems hard that a person who has bought what looks like a respectable coffee-house, and is described as an 'eligible investment,' should have foisted on him in lieu thereof a disorderly house. On the other hand, it is hard that vendors—trustees for sale—who know nothing of the improper purposes to which their tenant has put the property, should lose an advantageous sale because of the tenant's secret misdoing. The most plausible way of putting the case on behalf of the recalcitrant purchaser was to say—as was said—that he had not got what he bargained for, an eligible investment, and was entitled to rescind. But whose fault was it if he was disappointed of his bargain? Not the vendors'. There was no misdescription by them, no *suppressio veri* or *suggestio falsi*, nothing to found rescission. The property was what they described it, an eligible investment. Failing rescission there was only an *ad misericordiam* appeal to the judicial discretion in specific performance. But here again there was nothing to raise an equity against the vendors, nor any special hardship on the purchaser. *Lucas* v. *James* (7 Ha. 410) was in truth a much harder case, for there the purchaser wanted the premises for residential purposes, and found the neighbourhood full of disorderly houses. In *Hope* v. *Walter* the purchaser had it in his power at once to put a stop to the nuisance by turning out the obnoxious tenant.

The power of varying settlements on a decree for dissolution of marriage is an indispensable part of the machinery for working out the matrimonial equities. By such a decree the whole situation undergoes a transformation, the home is broken up, the spouses estranged, the charge of the children shifted, and the Court has to readjust the trusts of the marriage settlement to meet these

changed conditions. The guiding principle running through the cases —so Barnes J. has recently stated in *Hartopp* v. *Hartopp* ('99, 1 P. 65, 68 L. J. P. 33)—is that where the breaking up of the family life has been caused by the misconduct of the respondent, say a guilty wife, the Court in exercising its powers under the Matrimonial Causes Act, 1859, ought to place the petitioning husband and the children in a position, as nearly as circumstances will permit, the same as if the family life had not been broken up.

A wife, for instance, whose husband has divorced her would have to be endowed with a superhuman degree of amiability—a rival of the patient Griselda—to appoint him a life interest in a fund over which she has power, but the business of the Court is to eliminate this element of caprice, to mould the trusts of the settlement as if she still remained a dutiful and loving wife, and the home still an Eden, and give the husband the life interest which the estranged wife would have denied him; and this is what the Court did in *Hartopp* v. *Hartopp*. An assumption of this sort—that people are what they ought to be, like the analogous fiction of equity treating that as done which ought to have been done—helps, by an ideal standard, to keep the law from sinking to the lower levels of human nature.

There can be no doubt that the view recently taken by the Judicial Committee of the Privy Council in regard to the validity of the adoption of an only son by a Hindu of one of the three regenerate classes, is one which is not only in best accord with the weight of judicial authority in India, but is also distinctly in harmony with the trend of public opinion as evidenced by custom and usage in different parts of the country. The question arose in two cases forthcoming in L. R. 26 Ind. Ap., one of which (*Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma and others*) came up before their Lordships of the Privy Council in appeal from the High Court of Madras, and the other (*Radhamohan* v. *Hardai Bibi and another*) in appeal from the High Court of the North-West Provinces. In both cases the Indian Courts had decided in affirmation of the adoption, but owing to the conflict of opinion in other provinces, and the difficulty of rightly interpreting the original Sanskrit authorities, the question was one of considerable difficulty, and the decision of the Judicial Committee was anxiously awaited, as the only way of settling a point of Hindu law upon which there had been considerable controversy.

As regards the Hindu law bearing on the point, there were numerous texts condemning the adoption of an only son. But in a system like that of the *Smritis* which mixes up religion, morality and law, the distinction between the *vinculum juris* and the *vinculum pudoris* is not always clearly discernible; and the question which their Lordships had to decide was, whether the prohibitions embodied in the original texts were merely monitory, or were intended to be positive prohibitions. In support of the former view there were two important considerations. In the first place, it was to be noted that the texts which prohibited the adoption of an *only* son were not more precise than those which prohibited the adoption of the *eldest* of two or more sons. But it was now accepted by all schools of thought in India that the prohibition in the case of an *eldest* son was purely on religious grounds, which did not render the act of adoption itself a nullity. There were other precepts also, such as that a Hindu wishing to adopt should adopt his whole-brother's son in preference to any other person, and that there must be distress on the part of the natural father, which were not regarded as positive prohibitions. The accepted interpretation of such texts as mere religious injunctions certainly weakened the argument for a more rigorous interpretation contended for in the case of the text prohibiting the adoption of an only son. And, in the next place, the fact that modern practice and usage seemed to be in favour of such adoptions was a strong argument in support of a milder interpretation more in harmony with that adopted, by general consent, in the case of other prohibitions of a similar character. Upon the whole, therefore, it may be safely asserted that the decision of the Judicial Committee will command general approval.

[As Sir W. Comer Petheram, late Chief Justice of the High Court of Calcutta, has lately contributed two articles on the administration of Hindu law to this REVIEW, in one of which he strongly advocated the view now taken by the Judicial Committee, it may be useful to state that this note is from another learned correspondent well acquainted with another part of northern India. It will be observed that the Judicial Committee, sitting as an ultimate Court of appeal on Hindu law, disclaims any judicial knowledge of Sanskrit. Prof. Max Müller, whom their Lordships very wisely consulted, is in fact a Privy Councillor. Why should he not reinforce the Judicial Committee for the purpose of cases of this kind?]

We have received as usual the Calendar of the Law School of Dalhousie University, Halifax, N.S. As our readers may have

forgotten previous comments on this, we note that in Nova Scotia six teachers, three of them Queen's Counsel, are not thought too many for seventy-four students; that the course of study extends over three years; that students are recommended not to attempt office work (the equivalent of reading in chambers) simultaneously with the work of the School; that Moot Courts are held once a week, and presided over by one of the teaching staff; and that having argued in at least three moots is a necessary condition of obtaining the law degree. Also 'Students' text-books are not found in the Library': a daring but a wise rule. All which is respectfully submitted to people who are content with our existing 'legal education' at the Inns of Court. Meanwhile the Council of Legal Education continues its course of deliberate discourtesy to the Universities, whose examinations are well known to be of a much higher standard.

An able pamphlet by Mr. Walter J. Napier, apparently now practising at Singapore ('An Introduction to the Study of the Law administered in the Colony of the Straits Settlements': Singapore, 1898) contains some very curious legal or extra-legal history. The island of Penang, being then uncultivated and having no settled population, though more or less a resort of fishermen, was ceded by the Rajah of Quedah in 1786 to an officer of the East India Company, and that officer formally took possession of it under orders from the Governor-General and Council of Bengal, and hoisted the British colours 'in the name of His Majesty George the Third, and for the use of the Hon'ble English East India Company.' This was probably intended to place the island under the statutory powers of the Governor-General and Council to make regulations, and perhaps under the jurisdiction of the Supreme Court of Bengal, at any rate as regards European British subjects. Conflicting opinions, however, were given by successive Advocates-General as to the power of enacting laws and regulations or establishing Courts. It is hard to see why the island, having been solemnly ceded and taken possession of as above mentioned, was not one of the 'places subordinate' to the Company's settlement at Fort William for which the Governor-General and Council had power to legislate (13 Geo. III. c. 63, s. 36). But the practical result was that there was no known or settled law at all till 1807, though the Governor-General took on himself, to a certain extent, to treat the island like a non-regulation Province, by issuing a rough set of directions. As for European offenders, nobody knew what could be done with them; and the Presidency

Court at Calcutta disclaimed jurisdiction if they were sent there. In 1803 the only judicial officer of the island reported that the law of nature was the only law 'declaring crimes and respecting property' which he could find to be in force, and that the precepts of the law of nature proved inadequate for dealing with matters of succession, wills, and administration of estates. It would seem, in the light of the later authorities quoted by Mr. Napier, that the judge ought to have applied the Common Law with such modifications as local circumstances obviously required. It is not clear that he would have been supported.

A regular Court was established by royal charter in 1807. Singapore, acquired in 1823, was in a similar legal chaos till 1826. From 1830 to 1866 the Straits Settlements were under the Government of India; at the latter date they were made a separate colony. The various Indian Regulations (covering in fact the whole of British India), whereby Hindus and Mussulmans are entitled to their own laws of marriage, succession, and the like, were not literally applicable, for the earlier charters had introduced English law, and it was never contended that the Bengal Regulations had been substituted for or superposed on the Common Law of England when the settlements were attached to India. But in practice native custom, in matters of family law, was and is recognized, approximately as in India, under some kind of discretionary equity which has never been defined. It looks very like our old friend the law of nature wandering nameless because its name is in discredit with modern English lawyers, though Edward IV's Chancellor invoked it for the benefit of foreign merchants in the leading case on the doctrine of breaking bulk, 13 E. IV. 9, pl. 5. At all events Penang thought (even if the better opinion be that this was erroneous) that it was under mere law of nature for the first twenty years of the settlement.

Mr. Napier has tacitly solved one collateral problem, the reason of the formerly common and now all but forgotten term 'Penang lawyer' for a Malacca cane. The temptation to connect it with the time when every European in Penang was a law to himself is irresistible.

F. P.

We learn from the 'Zeitschrift für ungarisches öffentliches und Privatrecht' that the Commission appointed some time ago to frame a new Civil Code for Hungary has made considerable progress. The first draft of a new Code of Civil Procedure is in course of publication.

Mr. A. P. Perceval Keep writes to point out that he did not omit, as supposed by the reviewer of his edition of Roscoe's Criminal Evidence, to notice *R.* v. *Jones*, '98 ('91 by a clerical slip in the review), 1 Q. B. 119, but noticed it in two places, with cross-references, at pp. 279, 280, 438. What the reviewer really meant to express was that Mr. Keep should have noticed the case in yet another place. We are sorry that his remarks were so worded as to have the appearance of conveying an unfounded censure.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE NEGOTIABILITY OF DEBENTURES TO BEARER AND THE GROWTH OF THE LAW MERCHANT.

ARE debentures to bearer of English companies negotiable or not? The question is one of vital importance not only to the mercantile world but to the community at large, and there is good reason why it should be so.

The amount of such debentures now outstanding is probably not far short of £100,000,000; and instruments of this kind have been for the last thirty-five years and are daily being bought and sold in the market and dealt with as negotiable instruments by bankers, by brokers, by money dealers, by every class of the general public. Buyers and sellers alike in these transactions have acted and are acting on the assumption that the ordinary rules as to negotiable instruments apply, that there is no need to investigate title, that the instrument is transferable by delivery, that the holder of the instrument may therefore safely be treated as the owner, and that any one who in good faith and without notice purchases or lends money on such an instrument acquires a good title to the instrument and to the moneys thereby secured, notwithstanding that the person from whom he acquires the same has no title. In the face of this common understanding and widespread practice embodied in countless transactions, any impeachment at the present day of the attribute of negotiability as attaching to debentures to bearer must assume a very serious aspect.

It is well settled that according to the law of England an instrument can only be negotiable (1) by statute or (2) by the Custom of Merchants.

As to statutes, there is, so far as debentures are concerned, only one which touches the matter, namely the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). Under that Act the promissory note of a company may be under the company's seal (s. 91). A debenture to bearer containing an unconditional promise to pay (s. 83) may thus be held to be a promissory note and as such negotiable under the statute, and there are debentures in existence which have been issued in this form.

But by far the greater number of current debentures to bearer issued by companies in England contain conditions which exclude

them from ranking in the category of promissory notes, and in the case of these conditional debentures the only mode of establishing negotiability is to show that they are treated as negotiable by the general custom of merchants.

That the custom of merchants has in the past been competent to attach the quality of negotiability to divers instruments circulating here, whether made in England or abroad, is clear beyond controversy.

The negotiability in England of bills of exchange arose from the custom of merchants in England, and inasmuch as such instruments were but little used in England until the sixteenth century or later the custom could not have arisen until then.

The negotiability again of promissory notes in England arose in like manner in the seventeenth century, and was recognized by the Courts until Holt C.J. in *Clerke* v. *Martin*, 2 Lord Raym. 787 (1703) challenged the efficacy of the custom.

'Holt C.J.,' says the report, 'was *totis viribus* against the action and said this note could not be a bill of exchange, that the maintaining of these actions upon such notes was an innovation upon the rules of the common law, and that it amounted to setting up a new form of specialty unknown to the common law and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, and the whole Court agreed that promissory notes of any form were illegal at common law.'

And from the report of *Buller* v. *Crips* (6 Mod. 29), decided in 1704, it appears that shortly after the decision in that case Holt C.J. said that:—

'He had desired to speak with two of the most famous merchants in London to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course, and that they had told him it was very frequent with them to make such notes, and that they looked upon them as bills of exchange and that they had been used for a matter of thirty years, and that not only notes but bonds for money were transferred frequently and endorsed as bills of exchange.'

Yet in spite of this vigorous protest on the part of the Chief Justice the merchants gained the day, the Act of 3 & 4 Anne, c. 9—passed shortly after and in effect a declaratory Act, as Cockburn C.J. points out—vindicating the efficacy of the custom. Nor has the matter stopped there, for divers other instruments have been recognized by the Courts as having acquired the quality of negotiability by the custom of merchants. Thus the negotiability in England of

bonds to bearer issued by a foreign government was recognized in *Gorgier* v. *Mieville* (1824) 3 B. & Ald. 45, the negotiability of scrip certificates to bearer issued here in respect of a foreign loan in 1875 in *Goodwin* v. *Robarts* (L. R. 10 Ex. 1 App. Cas. 476), the negotiability in England of bonds to bearer issued by a South American Land Bank in 1892 (*London Joint Stock Bank* v. *Simmonds*, '92, A. C. 201). In this case Lord Macnaghten said :—

'The Cedulas in question are foreign bonds, with coupons attached, payable to bearer. Admittedly they pass from hand to hand on the London Stock Exchange and according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the character of complete negotiability. In a matter of this sort it is not I think desirable to set up refined distinctions which are not understood or are uniformly and persistently ignored in the daily practice of the Stock Exchange.'

In the same year, 1892, the negotiability by custom in England of bonds or debentures of an American railway company was recognized, *Venables* v. *Baring Bros.*, '92, 3 Ch. 527. Kekewich J. in that case said :—

'The only question I have to consider is whether they are negotiable according to the Law Merchant as part of the common law of England. On this point I have had the evidence of several gentlemen competent to speak, and they say they have no doubt about the matter at all.'

The above recent instances of negotiability by custom, though they serve to illustrate the principle, were all cases of foreign instruments.

The negotiability of debentures to bearer issued by an English company was first raised in 1873 in *Crouch* v. *The Crédit Foncier of England Limited*, L. R. 8 Q. B. 375. In that case it was tacitly admitted at the trial that such instruments were by the custom of merchants treated as negotiable; but the Court of Queen's Bench (Blackburn, Quain, and Archbold JJ.) held that as the instruments were English and the custom was modern, it was not effective. Blackburn J., who delivered the judgment of the Court, said :—

'As the instruments themselves are of recent introduction it [the custom] can be no part of the law merchant—the ancient law merchant which forms part of the law, and of which the Courts take notice.... We confine our judgment to the case before us, which is that of an English instrument made by an English company in England.'

In so deciding the Court was introducing what we may respectfully describe as a new-fangled distinction, namely that negotia-

bility could only be attached to an English instrument by what the learned judge called the ancient (i. e. immemorial) law merchant.

In *Gorgier* v. *Mieville*, supra, no suggestion of any such distinction was made. The ground of Abbott C.J.'s judgment in that case was simply that 'the bond is payable to bearer, and it was proved at the trial that bonds of this description were negotiated like Exchequer Bills.'

The view of the law expressed by Blackburn J. was not however to remain long unchallenged, for in 1875 the question how far modern custom was competent to attach negotiability to an instrument was raised in the case of *Goodwin* v. *Robarts*, L.R. 10 Ex. 337. In that case the instrument under consideration was scrip to bearer issued by Messrs. Rothschild for the Russian Government and to be subsequently exchanged for bonds to bearer of that government.

It was proved that such instruments were by custom treated as negotiable, but it was argued on the authority of *Crouch* v. *Crédit Foncier* that as the custom was modern it could not have effect. The Court (Cockburn C.J., Mellor, Lush, Brett, and Lindley JJ.) however held that the custom, though modern, was efficacious and that the scrip was accordingly negotiable.

'We think it unnecessary,' said Cockburn C.J. in a judgment which is a masterpiece of lucid exposition, 'to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract. The substance of Mr. Benjamin's argument is that because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money but only a promise to give security for money, it is not a security to which by the law merchant the character of negotiability can attach.

'Having given the fullest consideration to this argument we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law forming part of the common law and as it were coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body *lex mercatoria*, is of comparatively recent origin. It is neither more or less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which upon such usages being proved before them have adopted them as settled law with

a view to the interests of trade and the public convenience. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law and may thus be said to form part of it.'

The learned judge then proceeds to give instances of negotiability by the law merchant and continues:—

'It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that according to the old form of declaring on bills of exchange the declaration always was founded on the custom of merchants. Usage adopted by the Courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting up to the principle acted upon by our predecessors and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character as though the law had been finally stereotyped and settled by some positive and peremptory enactment?

'While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds which are of comparative modern origin, and yet according to *Gorgier* v. *Mieville* (1824, 3 B. & C. 45; 27 R. R. 290) are to be treated as negotiable. We think the judgment in *Crouch* v. *The Crédit Foncier* may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been a sufficient ground for refusing to give effect to it, that it did not form part of what is called "the ancient law merchant."'

The decision in this case was affirmed by the House of Lords, 1 App. Cas. 476, on the ground of estoppel; but also on the ground that negotiability was established. After stating that, in his opinion, the doctrine of estoppel was applicable, Lord Cairns added, 'I have no hesitation in saying that I also concur in what I understand to have been the *ratio decidendi* of the Courts below' in this case itself; in other words, that the custom of merchants in

England is still competent to attach the quality of negotiability to instruments not hitherto recognized as negotiable by the law merchant, whether such instruments are English or foreign, and whether of recent introduction or not. In *Rumball* v. *Metropolitan Bank* (1877, 2 Q. B. D. 194) the question again arose as to negotiability by custom. This time it was the case of scrip certificates to bearer, issued in England, by an English company, and certifying that on payment of certain instalments the bearer would be entitled to be registered as the holder of shares in such English company. It was proved that for some thirty-five years such scrip certificates had been customarily treated as negotiable, and it was held by the Court—Cockburn C. J. and Mellor (parties to the decision in *Goodwin* v. *Robarts*)—that by force of this custom, the certificates, albeit modern English instruments, had become invested with the qualities of negotiable instruments.

With the authorities in this state, the question again came up for decision in *Bechuanaland Exploration Co.* v. *London Trading Bank* ('98, 2 Q. B. 658); the instruments in that case being debentures to bearer issued by an English company—The Beira Junction Railway Company—in England. The debentures in question had been fraudulently taken from the plaintiff company, and pledged with the defendant bank; which took them for value, in good faith, without notice. Evidence was given, that, by the custom of merchants in England, similar debentures to bearer were, and for some twenty years and upwards had been, dealt with as negotiable instruments; and it was held, on this evidence, by Kennedy J., that the custom was efficacious; that the debentures, notwithstanding their being modern English instruments, were negotiable; and, accordingly, that the plaintiff's claim failed.

'It appears to me,' said the learned judge, 'that upon the vital question of the effect of modern mercantile usage, such as I think has been sufficiently proved in the present case, it is impossible to treat the reasoning of the Court of Queen's Bench in *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374, and the reasoning of the Exchequer Chamber in *Goodwin* v. *Robarts*, L. R. 10 Ex. 337, 1 App. Cas. 476, as capable of reconciliation. I read the judgment of the Exchequer Chamber in the later case as plainly disapproving of the reasoning of the judgment in the earlier case. It cannot I think be maintained that the judgment in *Goodwin* v. *Robarts* upon the effect of modern mercantile usage was unnecessary to the decision, nor I think can it be maintained that the two judgments are capable of reconciliation on the ground that the instrument in question in the earlier case was an English instrument, and the instrument in question in the later case was, though issued by a London agent, to all intents and purposes the scrip of a foreign government. In

the first place not only is there no hint in the judgment of the Exchequer Chamber, so far as it deals with the effect of modern mercantile usage, of an intention to confine it to the case of the scrip issued by a foreign government, or to exclude from the operative effect of modern mercantile usage an English instrument, but the Court of Exchequer Chamber prefaces this portion of the judgment by saying "We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract." In the second place it seems to me impossible to suppose that if *Crouch* v. *Crédit Foncier of England* was thought by the Exchequer Chamber to be still outstanding and capable of support on so clear and definite a ground as this would be, their judgment would (as the only ground of support for the decision in that case) have expressly stated that it might well be supported on the ground that in that case there was substantially no proof whatever of general usage.... Lastly, in the case of *Rumball* v. *Metropolitan Bank*, a Divisional Court of the Queen's Bench Division in the year 1877 treated *Goodwin* v. *Robarts* as decisive of an action in which a similar question arose upon an English instrument. The Court, it may be noted, consisted of Cockburn C.J. and Mellor J., the former being the judge who had delivered the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*, and the other one of the judges who took part in the decision of that case. It is impossible to suppose that they were not fully aware of all that could possibly be held to distinguish, if anything could, the two decisions, and *Crouch* v. *Crédit Foncier of England* was cited to them in argument. But in their considered judgment they held the matter of the effect of usage in conferring negotiability upon an English instrument, although not negotiable by statute or by the ancient law merchant, as settled by the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*. It appears to me that having regard to the decisions of the Exchequer Chamber in *Goodwin* v. *Robarts* and of the Queen's Bench Division in *Rumball* v. *Metropolitan Bank*, if I have come as I have to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions, and these decisions .... appear to me practically to over-rule the decision in *Crouch* v. *Crédit Foncier of England*, and to govern this case.'

Here then we have a clear and authoritative pronouncement on this much vexed question of the negotiability of debentures to bearer, issued by an English company, in England—a pronouncement by a judge of acknowledged eminence as a commercial lawyer. The law, speaking by its accredited interpreter, declares such instruments to be negotiable, and shakes itself free from the fetters which *Crouch* v. *Crédit Foncier* would have imposed upon it.

Such a termination of the controversy, it might have been thought, would have met with general acceptance. Yet, strange to

say, there are still persons who adhere to the narrow view of the *lex mercatoria* enunciated in *Crouch* v. *Crédit Foncier*, and claim in its favour a continuous current of authority, that is to say *Edie* v. *East India Company* (1760) 2 Burr. 1216; *Glyn* v. *Baker*, 13 East 509; 12 R. R. 414; and *Partridge* v. *Bank of England*, 9 Q. B. 398. But none of these, it will be found when examined, support the narrow view or militate against the view taken by Kennedy J. They can only be glanced at very briefly here.

(1) The first, *Edie* v. *East India Company*, was a case of a bill of exchange payable to order. It had been endorsed to a specified person without the addition of the words 'or order.' It was alleged and proved that there was a custom of merchants that such an endorsement was in effect restrictive; but the Court held that any such custom was void on the ground that it was inconsistent with a mercantile custom already recognized and established by decisions of the Court.

'The point now in question,' said Lord Mansfield in his judgment, 'has been already solemnly settled both in the Court of King's Bench and Common Pleas by the two adjudications that have been mentioned and therefore witnesses ought not to have been examined to the usage after such solemn determination of what was the law.'

Denison and Foster JJ. also concurred, the latter saying that 'This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to the jury *after it had been already settled by judicial determination;*' and Wilmot J. was of the same opinion, holding that 'these judicial decisions on the point are the *lex mercatoria* as to this question.' This decision may therefore be laid aside as quite wide of the point. It in no way supports the view that negotiability cannot be attached to an English instrument by a modern custom.

(2) In *Glyn* v. *Baker*, 13 East (1811) 509, the plantiff sued for conversion of bonds under the seal of the East India Company, whereby payment was promised to a specified person, his executors, administrators, or assigns, 'by endorsement hereon.' A verdict was found for the plaintiff subject to the opinion of the Court. The case was argued before Lord Ellenborough C. J. and other judges; but the decision did not turn on the question of negotiability: so far indeed was it from doing so that there was not even a statement in the case that the bonds were negotiable by custom! Lord Ellenborough's observations at p. 513 are mere *obiter dicta*, not impugning, in any way, the principle, that the class of negotiable instruments, recognized by the *lex mercatoria*, may be enlarged by evidence of custom. This decision, therefore, is not in point.

(3) In *Partridge* v. *The Bank of England* (1846) 9 Q. B. 396, the question raised was as to the negotiability of dividend warrants issued by the Bank of England. It was pleaded and proved that, according to the usage and custom of bankers and merchants used and approved *in London* for divers, to wit, sixty years now last past, all such dividend warrants were transferable by delivery only, and without endorsement, and that the bona fide holder of every such warrant was according to such custom entitled to receive payment of the money in each such warrant expressed from the defendants on demand. This was the custom, although the warrants were not in terms made payable to bearer.

'It is not,' said Tindal C. J., 'necessary to inquire what the effect of a general immemorial custom in a particular place might be, as this usage is not so pleaded, but is described as a usage and custom of bankers and merchants used and approved [in London] for divers, to wit sixty years, and such a practice cannot alter the law by which such an instrument does not confer any right of action on an assignee. . . . It seems however to us that even supposing the usage stated to be binding . . . the pleas are defective, in not showing that the case in question comes within the usage. . . . The usage is described as entitling the bona fide holder to payment; but L. & Co. are not averred to be bona fide holders.'

Here again the decision is not in point. It does not show that no modern general custom of merchants can attach the quality of negotiability to an English instrument, but that a modern *local* custom—a custom, e. g., prevailing in London only—is insufficient to do so; a proposition which no one would be likely to quarrel with.

But though the so-called authorities against negotiability by modern custom thus tumble down on examination like a pack of cards, there are still some criticisms of Chief Justice Cockburn's judgment in *Goodwin* v. *Robarts* which call for brief notice.

First, it is said that Cockburn C. J. was wrong in treating a general custom of merchants as a matter of fact to be proved by evidence; that the law merchant, being part of the common law, judicial notice is taken of it—that it is not a matter for the evidence of witnesses, or the verdict of juries, but a question of law for the decision of the Court; and, in support of this proposition, the words of Denison J., in *Edie* v. *East India Company*, 2 Burr. 1216, are referred to, viz. 'the point in question is not matter of fact, but matter of law.' But this criticism is manifestly unsound: Denison J. was not referring to the *lex mercatoria*, or custom of merchants generally, but to a case in which a mercantile custom having previously been established on more than one occasion the

Court was bound to take judicial notice of it. See supra, p. 252. It is well settled that where a mercantile custom has not been judicially established, it has, if relied on, to be alleged and proved as a fact. *Lickbarrow* v. *Mason*, 1794, 5 T. R. 688; *Lang* v. *Smyth*, 7 Bing. 284; 33 R. R. 462; *London Joint Stock Bank* v. *Simmons*, '92, A. C. 201. Nor is this a modern rule: it was in full force some six hundred years ago, as appears from the case of *Dederit* v. *Abbot of Ramsey*, Trin. term, 8 Edward II, Coram Rege Roll 93. In that case the plaintiff, Simon Dederit, was a townsman of Guynes. His goods had, as he alleged, been unlawfully attached and disposed of, at a fair of the abbot, contrary to the law merchant. He said 'Quod lex mercatoria talis est in omnibus et singulis nundinis per totum regnum,' that if merchandise brought from abroad was attached, and the custodian alleged that he had no interest in the goods except as a servant, the goods were to be kept in the custody of the lord of the fair for a specified period, so as to give the owner an opportunity of claiming them, 'Et quod lex mercatoria talis sit paratus est verificare,' &c. The defendants alleged that the law merchant was different; and thereupon the record shows that the sheriffs of London, Lincolnshire, Hampshire, and Northamptonshire, respectively, were ordered to send twelve 'probos et legales mercatores' to Westminster—namely, twelve from London, twelve from Lincoln, twelve from Winchester, and twelve from Northampton—to try the question. So much as to the procedure prior to the judicial establishment of a custom. On the other hand, as Lord Campbell said in *Brandao* v. *Barnett* (1846) 12 Clark & Fin. 787—

'When a general custom has been judicially ascertained and established, it becomes part of the law merchant which the Courts of Justice are bound to know and recognize . . . . and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case.'

Secondly, it is said that the judgment of Cockburn C.J. is based upon a confusion between the law merchant and the practices of traders; but in reality there is no confusion. The learned judge, in the passage referred to, was dealing with the historical evolution of the law merchant. A general custom of merchants commences in particular usage; it is not simultaneously adopted among all merchants throughout the kingdom. It is tried at first by a few, found convenient, spreads by degrees, and ends by becoming a general custom, and, in due time, is incorporated into the body of the *lex mercatoria*. This is the ordinary genesis of mercantile custom. It is well illustrated in the history of the custom,

or usage, under which bankers have a general lien on the securities of their customers. It began in usage more or less partial or local, until, by recognition of its advantages, it grew into a general custom, received judicial sanction, and so became engrafted on the law merchant. See *Barnett* v. *Brandao*, 12 Cl. & Fin. (1846) 787; and Lord Campbell's observations at p. 804.

This custom of bankers' lien is specially instructive as illustrating the growth of the *lex mercatoria*, because the business of bankers in England is of recent origin, hardly dating further back than the Commonwealth. See Macaulay's History of England, vol. iv. p. 491; Macleod, Theory and Practice of Banking, vol. i. p. 433; J. Biddulph Martin on The Grasshopper in Lombard Street and 'the Mystery of Modern Goldsmiths or Bankers, 1676,' a reprint of which is set out in an appendix to Mr. Martin's interesting work.

Thirdly, it is said—pursuing the criticism of the judgment in *Goodwin* v. *Robarts*—that Cockburn C.J. and the writers he cites were mistaken as to the time when bills of exchange first became negotiable in England. The prevailing opinion certainly has been that they did not come into use until the sixteenth or seventeenth century. They are mentioned it is true—as Cockburn C.J. pointed out—in a statute in the year 1379, 3 Richard II, cap. 3; they may possibly have been known earlier, but admitting they were, there is nothing to show that the quality of negotiability had been attached to them in those earlier days. They certainly did not come into general use in England until the sixteenth or seventeenth centuries. The fact that the first reported case, *Martin* v. *Boure* (Cro. Jac. 6), is one of 1 James I, 1603, affords cogent evidence that they were not very generally used before that time, and although Malynes in his *Lex Mercatoria*, published in 1622, gives a form of bill of exchange, drawn by a merchant in London on one in Amsterdam, it is in favour of A. B. without the words 'or bearer,' 'or order,' so that it was not negotiable in form; *Plumley* v. *Westley*, 2 Bing. N. C. 251.

Fourthly, it is said that Cockburn C.J. was under a similar mistake in treating Exchequer Bills as having become negotiable by modern custom, inasmuch as they were creations of statute and made negotiable by 48 Geo. III, c. 1, and that it was so held in *Wookey* v. *Pole*, 4 B. & Ald. 1; 22 R. R. 594. The statute, however, does not purport to make them negotiable, and an examination of the decision shows that Holroyd J. alone relied on the statute. Abbott C. J. in giving judgment treats the question as independent of the statute.

'The question in the present case is whether the transfer of the

property in an exchequer bill is to be governed by those rules which regulate the transfer of property in bank notes and bills of exchange, originally made payable to the bearer, or become so payable by the effect of an endorsement, according to the custom of merchants, or by those rules which regulate the transfer of the property and goods and chattels . . . .'

And he proceeded to express his opinion that the transfer was governed by those rules which applied to notes and bills of exchange, and Best J. concurred.

Exchequer bills had in fact been in use for more than a century before that statute, and during all that time they had, it is believed, been framed as instruments to bearer, or order, and no doubt had become negotiable by custom [1].

Fifthly, it is said that there is a manifest difference between the admission of a customary law already known and accepted among the merchants of other trading nations and the admission of modern usages or customs. But the answer is that the law of England does not and never did recognize this difference. Negotiability in England depends on English custom, not on foreign law or custom; see *Pickard* v. *London and County Banking Co.*, 18 Q. B. D. 515; and the true criterion is not whether the usage is modern or ancient but whether it is general.

Lastly, it is said that in Willis on Bills of Exchange (a reprint of lectures) the learned writer, now a County Court Judge, expresses the opinion that 'the observations of Cockburn C. J. in *Goodwin* v. *Robarts* have not in any degree the binding effect of *Crouch* v. *Crédit Foncier of England*.' But this opinion (without argument) was expressed before the judgment of Kennedy J. in *Bechuanaland Exploration Company* v. *London Trading Bank*, '98, 2 Q. B. 658. Moreover against this opinion we may set the opinion of another County Court Judge, the eminent draftsman of the Bills of Exchange Act, 1882, Mr. M. D. Chalmers, who in the introduction to his 'Digest of the Law of Bills of Exchange,' refers with approval to the passage set forth above from the judgment of Cockburn C. J. in *Goodwin* v. *Robarts*, and proceeds as follows:—

[1] Even so early as 1697 they were made payable to bearer, and a recent writer (Phillips on Bankers of Northumberland) gives a facsimile of an exchequer bill bearing date August 6, 1697, framed in these terms: 'Pursuant to an Act of Parliament authorizing bills to be issued for £1,500,000, this bill entitles the bearer to £5 to pass in all payments to receivers or collectors of supply, &c., a farthing a day interest.' And in the Treasury Papers for 1697 there is a letter of September 7 from W. Matthews to Mr. Secretary Trumbull acquainting him with the progress the writer had made at Exeter in relation to the Exchequer Bank and saying that the people 'ardently craved exchequer bills for their commerce. The excise men thought there could never be enough sent down: the tuckers and traders coveted them for a medium of commerce.' For many years, too, there were 'Trustees for the Circulation of Exchequer Bills.' See the Treasury Papers of the seventeenth century.

'The law throughout has been based on the custom of merchants respecting them [i. e. bills of exchange]; the old form of declaration on bills used always to state that it was drawn *secundum usum et consuetudinem mercatorum*. In the time of Chief Justice Holt a controversy arose between the Courts and merchants as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by the statute 3 & 4 Anne, chapter 9, which vindicated the custom and confirmed the negotiability of notes. Again in 1873 the Court of Queen's Bench were of opinion that documents other than bills and notes could not be endowed by custom with the incidents of negotiability. But the efficacy of the custom was again upheld by the Exchequer Chamber in 1875 in *Goodwin* v. *Roberts*.'

And against the solid reasoning and sound policy of that decision the petty waves of criticism cited above do but dash themselves in vain.

Upon a general view of the whole question it is submitted that the progressive view expounded by Cockburn C. J. and ever since acted on by the Courts, is the true view and unassailable. It would be a great misfortune were any other view to prevail.

The excellence of our English common law, that which makes it in Coke's phrase 'the perfection of reason,' is that it is the body of national custom which the people have found out for themselves to be just, salutary, and convenient, and which they have moulded from time to time to meet the changing conditions of society. It is exactly so with the body of mercantile customs which the law has sanctioned under the name of the law merchant. It represents the usages which the mercantile community have adopted for themselves; it is of all laws in the world, to use the words of the author of that legal classic Smith's Leading Cases, 'the most completely the offspring of usage and convenience and the least fettered by legislative regulations.' It is this which gives mercantile law its peculiar plasticity and enables it to meet by new methods the demands of modern trade. Why is this power of adaptation to be arrested and the law merchant to fossilize in its mediaeval condition as it must do if no modern custom of merchants, however general, can be recognized by the Courts as part of the *lex mercatoria*? What superior sanctity, it may be asked, attached to those usages of merchants in the middle ages which the Courts recognized as part of the common law over the usages of merchants in this nineteenth century of ours? Take away the capacity of self-adjustment to the social environment which usage means and the law is no longer a living law but a dead law. The days of Lord Holt, the days when the common law judges were jealous of the growth and independence of mercantile customary law, are past.

A new era, a truer judicial policy, a juster conception of the value of usage, was inaugurated by the larger wisdom and sagacity of Lord Mansfield and matured by the strong sense of Lord Ellenborough and the juristic genius of Chief Justice Cockburn. Why are we to quit the path of progress and enlightenment which they have traced for us and follow the narrow and retrograde way indicated in *Crouch* v. *Crédit Foncier*? *Vestigia nulla retrorsum.*

The views expressed in the foregoing pages are not in accord with the views set forth in the article intituled 'The Law Merchant and Transferable Debentures,' contained in the last number of this REVIEW. The writer of that article (Mr. F. A. Bosanquet, Q.C.) conscientiously urges all available arguments in favour of the retrograde view; he suggests that the view is based on 'a continuous current of authority'—what its value is has been already seen. He protests against the heresy that any custom of merchants, even a general custom, shown to have originated within legal memory, i. e. since the commencement of the reign of Richard I (July, 1189), can be recognized by the common law as part of the law merchant or be capable of modifying common law rules. He dissents from the views as to the development of the law merchant expressed by Cockburn C.J. in *Goodwin* v. *Robarts* ubi supra; by the Queen's Bench in *Rumball* v. *Metropolitan Bank* ubi supra; and by Kennedy J. in *Bechuanaland Railway Co.* v. *London Trading Co.* ubi supra; and he administers a solemn caution to those who may venture to act on the assumption that these views and decisions are sound.

It is, however, to be hoped that the plain statement set forth in the foregoing pages will suffice to show that the caution is needless, and that the general practice of business men illustrated in the negotiability of debentures to bearer, so far from being in conflict with our common law, is really fulfilling its true spirit and policy.

FRANCIS BEAUFORT PALMER.

THE ETHICS OF ADVOCACY [1].

'Clienteis sibi omnes volunt esse multos;
Bonine an mali sint, id haud quaeritant;
Res magis quaeritur, quam clientium
Fides quoiusmodi clueat.'

PLAUTUS, Menaechmi, act iv. sc. ii. 4.

FROM the most ancient times down to the present day, the practisers of professional advocacy in courts of justice have come under the ban of depreciatory and deprecatory criticism, based for the most part upon a thoughtless misconception of the proper function and duty of an advocate.

It is of course incumbent upon every advocate in all cases to act judiciously for his client, and in a sense judicially; by exercising a proper discretion, not only as to the manner of conduct of the cause, but as to the matter of it: for instance, by a discreet selection as to which of the materials supplied to him he will employ, and which he will jettison in order to lighten the cargo of the case, or because it would be improper to employ them. He is, nevertheless, rightly regarded as the partisan of his client. There is, however, one well established exception to this rule, it being a generally recognized principle in criminal prosecutions in this country that counsel for the Crown should regard himself not as a mere advocate for a party, striving to win a verdict, but as an assistant to the Court in fairly putting the whole case before the jury, and in ascertaining the truth according to the law. He is 'really a part of the Court—a kind of minister of justice filling a *quasi*-judicial position.' In civil cases 'the cause is between party and party, and the advocate must use all fair and proper means to get his client a verdict if possible; but in criminal Courts he is in a very different position, and should avoid all technical objections, and *nisi prius* tricks, in order that the issue may be tried on its merits [2].'

Any one who has watched the administration of the criminal law in this country knows how loyally—one might almost say how religiously—this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the

[1] Being a paper read before the University Graduates Club at Birmingham on December 20, 1897. Revised, with additions and notes.

[2] Blackburn J. in *Reg.* v. *Berens* (1865) 4 F. & F. at pp. 553-7; and S. C. *sub nom.* *Reg.* v. *Holchester* (1865) 10 Cox C. C. at pp. 227-8. Cf. the observations of Lord Langdale M.R. in *Hutchinson* v. *Stephens* (1837) 1 Keen 668, who, however, employs very similar language with reference to *civil* cases.

name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed. Thus it was that Queen Elizabeth declared to Lord Treasurer Burleigh that she would have the form of the records altered, so as to show that her Attorney-General was counsel not so much *pro domina Regina* as *pro domina Veritate*[1]. The principle above mentioned is no doubt based upon the view that while the law cannot always secure the conviction of the guilty, it can and ought to secure against the conviction of the innocent, by hedging them round from any suspicion of the law being strained against them merely because they are accused.

The function and duty of counsel for the defence in a criminal case are very different. Speaking generally, they are, as one of the most eminent living authorities upon criminal law and practice has recently tersely expressed it, 'to get an acquittal if he can, whatever the merits of the case may be[2].'

This short sentence pithily raises in a concrete form the whole question as to the duties of an advocate *in foro conscientiae*—his ethical as distinguished from his forensic duty, and whether the two are reconcilable or mutually exclusive.

Jeremy Bentham, in his zeal for the prevention, detection, and punishment of crime, regards a lawyer who by his counsel enables a criminal to escape punishment, whom he knows by his confession to be, or whom he believes to be guilty, in the light of an accessory after the fact. Indeed Bentham treats an advocate who defends a guilty criminal as almost *in pari delicto* with an accessory before the fact—that is, in law, one who 'counsels' the offence—and certainly as being equally culpable with an accessory after the fact, that is one who 'relieves, comforts, or assists' the criminal[3]. In criminal cases, therefore, Bentham would abolish the privilege that obtains for confidential communications between the client and his legal adviser; which he somewhat caustically describes as a professionally created exemption from the unpleasant obligation of rendering service to justice. The only difference he seems to see between an advocate and an accessory is that the latter is punished, while the former is not, but on the contrary is applauded[4].

[1] Sir Edward Coke, then Attorney-General, says he 'well remembers' this saying of the Queen, 3 Coke Inst. 79.

[2] Sir Harry Bodkin Poland, Q.C., at p. xxi of his Short History of the Criminal Evidence Act, 1898, prefixed to Mr. Baugh Allen's edition of the Act.

[3] 1 Hale P. C. 618; Hawk. P. C. Bk. II. c. 29, ss. 26–28, 32.

[4] Rationale of Judicial Evidence, bk. ix. ch. v. Bentham's Works, ed. by Bowring, vol. vii. 472–9. Bentham, however, was not unaware—as his reference to authorities at p. 474 shows—that the privilege is that of the client and not of his professional adviser.

Bentham's notion that the undertaking to defend a criminal is a guilty compact between a malefactor and his confederate in crime is based upon a fallacy, and upon a total misconception of the true relations that exist between client and advocate, which are primarily founded upon the principle *Qui facit per alium facit per se.* The advocate speaks *for* the accused, even though the latter also speak himself, with a superadded obligation, however, not only to say and do for him all that he may in honour and fairness say and do for himself, but to find him that skill in dealing with witnesses and evidence, that knowledge of the law, and that orderly, lucid, and interesting manner of presenting a case in Court, which the average man lacks, especially when under the shadow of a personal charge, affecting his pocket, his reputation, his liberty, or his life. Further, no man is bound to accuse himself, and if, instead of conducting his own case he entrust it to another, that other is *pro hac vice* to be regarded as standing in the shoes of and as representing the accused, and consequently must do nothing inconsistent with that representative capacity. Finally, the innocence of the accused is to be presumed up to the time that by the verdict of the jury he is *proved* to be guilty according to the law and to the established and strict rules of evidence. The natural man when inquiring into anything knows nothing of the inadmissibility of evidence. He admits everything, hearsay or otherwise, and concerns himself solely with its credibility. The very existence of the legal rules of evidence is based upon the fact that no human tribunal can be omniscient or infallible; and all such rules, made to exclude all but the best kinds of proof, are in their very nature nothing else than merely artificial safeguards against miscarriage of justice. Hence it is that guilty persons are generally thought none the worse of because they plead 'not guilty.' A shrewd appreciation of the principles of our criminal law, as well as not a little wit, was shown in the answer of the prisoner who, when asked to plead guilty or not guilty, replied, 'Faith, and how can I tell until I've heard the evidence?' This is in fact the principle upon which, as we shall see, an advocate is justified as a rule in defending his client to the uttermost, irrespective of his actual guilt or innocence, and even notwithstanding that he may have made to him a private confession of his guilt [1].

[1] Such confessions are not common, and, from the advocate's point of view, are generally undesirable; though even a confession is not always to be regarded as an irrefragable proof of guilt. No English Court, for instance, would send a man to the gallows on his own bare and unsupported confession of murder. Such confessions have often turned out to be false, and to have been made from a variety of reasons, e. g. intoxication, mental delusion, being the tool of another, or in order to save another's life.

Bentham's theories upon legal subjects have, as Sir James Stephen has observed, had a degree of practical influence upon the legislation of his own and other countries comparable only to that of Adam Smith upon commerce[1]. Nevertheless few read his voluminous works nowadays, partly because some of his books are—to borrow the striking illustration of the learned author just quoted—'like exploded shells, buried under the ruins which they have made[2].' His inadequate knowledge and experience of practice exposed him to the weaknesses to which merely theoretical jurists are prone; and acute as were his powers as a critic, his bias as a controversialist prevented him from seeing our legal system steadily, and from seeing it whole. He had a juridical rather than a judicial mind, and his hatred of what he delighted to call 'lawyer craft' blinded him to the substantial merits and nobler aspects of the practice of advocacy, and led him into extravagances of opinion and expression[3].

I have discussed Bentham's views and opinions thus fully, because they probably constitute the strongest indictment of the profession and practice of advocacy that has ever been penned, in this country at any rate, by one who though not actively engaged in the profession of the law was a professed jurist. A large number of equally respectable authorities, both legal and lay, might be quoted by way of counterblast to Bentham's views. I shall content myself by referring to what two eminent contemporaries of his have said upon the same subject. In the year 1824 Sydney Smith preached an excellent assize sermon at York[4], before Mr. Justice Bayley and Baron Hullock—though with the unpromising title of 'The Lawyer that tempted Christ'—in the course of which he said:

[1] Hist. of Crim. Law, ii. 216.

[2] Steph., Digest of the Law of Evidence, 4th ed., p. 21. Elsewhere he employs the same metaphor: 'The Rationale of Judicial Evidence might be compared to a shell bursting in the powder-magazine of a fortress, the fragments of the shell being lost in the ruins which it has made,' Gen. View of Crim. Law of England, 2nd ed., 206. A long list of practical reforms suggested by Bentham, and wholly or partially adopted by the Legislature, will be found in the advertisement (1837) by Sir John Bowring to vol. i of his edition of Bentham's Works. Others have been adopted since. The latest step towards the realization of Bentham's principle, that no class of witnesses should be incompetent, and no kind of evidence excluded, but that every fact should be admitted for what it is worth, is the Criminal Evidence Act, 1898, making accused persons, and their wives or husbands competent witnesses for the defence. The modern history of the law of evidence is that of a struggle to let more light into the too closely barred chamber of judicial procedure.

[3] See Bentham's Rationale of Judicial Evidence, Works, vi. 333, 250, where he permits himself to describe the judge on the bench as the 'confederate' and 'accomplice' of his friend and connexion the counsel at the bar, whom he also vilifies. In short, judge, counsel, and attorney alike are regarded by Bentham as associates in a common conspiracy to defeat the ends of justice. He defames and defaces till he leaves—

'Not even Lancelot brave, nor Galahad clean.'

[4] Sydney Smith's Works; two vol. edit., vol. ii. 190.

'Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men presenting to the selection of an impartial judge the best arguments for the establishment or explanation of truth. It becomes then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others.'

The other great contemporary of Bentham is Dr. Johnson. His conversation with Boswell in which he expressed his opinion of the practice of advocacy has become classical, and is indeed a *locus classicus* always referred to in discussing this subject. When Boswell asks him, 'But what do you think of supporting a cause which you know to be bad?' Johnson conclusively replies: 'Sir, you do not know it to be good or bad till the judge determines it.... An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right. It is his business to judge, and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion[1].'

Here we have the whole matter in a nutshell; and the common sense of most will agree that the fallacious reasoning of the theoretical jurist cannot prevail over the clear and convincing opinions to the contrary of the Christian teacher and of the stern moralist.

Among practical lawyers there is no difference of opinion. The following passage in a considered judgment of the late Lord Bramwell, delivered nearly a century after Dr. Johnson's death, reads like a paraphrase of his famous conversational utterance. 'A man's rights,' said Baron Bramwell, 'are to be determined by the Court, not by his advocate or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, "I want your advocacy, not your judgment: I prefer that of the Court[2]."'

With regard to questions of law it frequently happens that arguments that convince one man have no weight with another; and that instead of there being two sides to a question, there are sometimes three or even more. Cases are by no means unknown in which counsel for the plaintiff have relied upon one set of arguments, and counsel for the defendant upon another; while the Court has

[1] Boswell's Life of Johnson (Globe ed.), 189.

[2] *Johnson* v. *Emerson* (1871) L. R. 6 Ex. at p. 367. This case contains an interesting discussion and difference of opinion between Bramwell and Martin BB. and Kelly C.B. and Cleasby B. as to the effect of misleading the Court without 'reasonable and probable cause.' See per Martin B. at p. 378. See also at pp. 341, 365, and 392–5.

decided upon a ground that had occurred to neither side. Who has not heard how of three judges sitting in *banc*, Mr. Justice C. delivered the terse and oracular judgment: 'I am of the same opinion as my brother A., for the reasons given by my brother B.'[1]

It has been said that an advocate is no more concerned to consider whether his arguments be logical than an angler whether his fly be edible. That, of course, is pushing an illustration too far. But there is a real danger in an advocate resting his whole case on one or two points which he has selected as being strongest for argument, when several others, though some be of less weight, are open to him. For some of those which he has discarded as untenable or weak, may, as experience commonly shows, influence the mind of the judge who tries the case, and whose judicial acumen may be as unquestionable as is the advocate's forensic insight.

An advocate, like a judge, should ever bear in mind that he has no monopoly in truth-seeking, and no certainty that he will arrive unaided at a just conclusion as to the law; and that after that elucidating discussion which comes of the collision of opposing intellectual forces in Court, he may be convinced that a view to which he was originally strongly predisposed, or had gradually formed, was after all incorrect.

Similar considerations apply to questions of fact. Not only do the same facts strike different minds in different ways, as is seen when a jury disagrees, but they operate upon the same mind differently, according as they are or are not fully threshed out. How often it has happened that on the first blush of a case a lawyer has come to a conclusion adverse to his client, when further investigation of the circumstances has entirely changed his opinion. A little consideration will show the impossibility of the contention of those who maintain that an advocate should undertake only such causes as he believes to be just.

The present Lord Chancellor, in a private letter written in 1893, of which I am now permitted to make use, has expressed his opinion on this subject in words which deserve to be known and remembered. After referring to Lord Brougham's famous deliverance to the effect that an advocate must sacrifice everything to the interests of his client—with which I will deal presently—Lord Halsbury says:—

[1] 'My brothers differ from me in opinion, and they all differ from one another in the reasons of their opinion,' said Holt C.J., referring to Gould, Powys, and Powell JJ., in *Ashby* v. *White* (1702) 1 Ld. Raym. at p. 950. An instance of 'quick change' of judicial opinion was recently remarked by Lord Macnaghten in a learned Lord Justice of Appeal, 'who seems to have retracted or qualified his opinion before the next case was called on!' *Eastman Photographic Materials Co.* v. *Comptroller General of Patents*, '98, A. C. at p. 582; the reference obviously being to *Re Van Duzer's, and Leaf Sons & Co.'s Trade Marks* (1887) 34 Ch. D. at pp. 642, 644. See at p. 645.

'A thesis has been propounded on the other side more extravagant, and certainly more impossible of fulfilment; that is, that an advocate is bound to convince himself, by something like an original investigation, that his client is in the right before he undertakes the duty of acting for him. I think such a contention ridiculous, impossible of performance, and calculated to lead to great injustice. If an advocate were to reject a story because it seemed improbable to him, he would be usurping the office of the judge, by which I mean the judicial function, whether that function is performed by a single man, or by the composite arrangement of judge and jury which finds favour with us. Very little experience of courts of justice would convince any one that improbable stories are very often true notwithstanding their improbability.'

It would be easy to demonstrate that this 'original investigation' theory, even if maintainable as a speculative thesis, would be simply unworkable in practice. Moreover, the result would be that all the worst cases would ultimately find their way into the hands of the lowest class of advocate, with the result that their last state would be even worse than the first, not only for the particular clients, but in the general interests of public justice, which are not best served by the worst class of litigants being invariably represented by the worst type of lawyer.

The question under consideration has had to be practically dealt with in the Divorce Court, where as a general rule the wife's costs are payable by her husband, whether she be successful or not—the logical consequence of the common law doctrine that everything a wife possesses on marriage passes to the husband. Where her legal adviser has been guilty of no misconduct, and has not instituted proceedings without any reasonable ground, the Court will not deprive him of his costs, even though his client have been unsuccessful in her suit; for, 'It would be in the highest degree prejudicial,' said the late Lord Hannen—then Sir James Hannen—'in the interest of the women who are litigants in this Court to cast upon the attorneys whom they consult the dangerous responsibility of coming to a conclusion in doubtful cases as to what is likely to be the finding of the Court upon the facts submitted to them[1].' The same learned President of the Court similarly observed in a later case that 'it would be impossible to ascertain in what cases the solicitor has become aware that his client was guilty, or at what stage of the proceedings he may have acquired that knowledge. Nor do I think that a solicitor, as soon as he discovers that the wife cannot deny the charges made against her, is bound to abandon her. If he did so, it would cause her to seek

[1] *Flower* v. *Flower* (1873) L. R. 3 P. & D. at p. 134.

the assistance of some less scrupulous adviser. *There is an honourable way of defending the worst of cases*[1].'

There is yet another evil which would inevitably result if members of the legal profession were to pick and choose which of the cases laid before them they would take up, and which they would have nothing to do with. Generally speaking, a man's previous conduct and character on occasions other than that in question are not relevant to the issue whether he did or did not do a particular act on a particular occasion. Of the two exceptions to this rule, the main one is that evidence of good character is admissible in favour of the defendant in all criminal proceedings. This admission of evidence of good character as evidence for the defence is a well established exception to the modern rule that every case must be tried on its own merits. But if the character of the advocate is to be imported into the question, as well as that of his client, strange results indeed would follow; especially now that the accused is, by the Criminal Law Evidence Act, 1898, enabled to give evidence on his own behalf. He would be liable to be cross-examined as follows:—'Is it not a fact that you at first asked Mr. A. to take up your case, and on looking into it he declined to do so? Did you not afterwards approach Mr. B., Mr. C., and Mr. D. with the like result?' If such a line of interrogation were permitted, it would place Mr. E., who *did* take up the case, in an unfair, invidious, and wellnigh intolerable position[2]. Further, it would actually make the opinion of the advocate part of the *res gestae*; and according as an advocate known to have declined to entertain a case were a man of character and eminence in his profession, or a lawyer whose private opinion would be generally regarded with almost as much weight as a judicial utterance, the case for the defence of the unfortunate defendant would be proportionately prejudiced. Thus, as it has been tersely put, 'the suitor would be prejudiced in proportion to the respectability of the advocate who had shrunk from his defence, and the character of the counsel would be evidence in the cause[3].'

[1] *Smith* v. *Smith* (1882) 7 P. D. at p. 89.

[2] The evils which would follow if such a practice were to obtain generally will be patent from a perusal of the probate case of *Wickham* v. *Payne* (tried by Gorell Barnes J. and a special jury), reported in the Times, Feb. 3, 1899; though in the particular circumstances of that case such a cross-examination of the plaintiff appears to have been justifiable.

[3] Essays, by Basil Montagu (1837), p. 268. Erskine, dealing with this topic in his defence of Thomas Paine, forcibly said that: 'If the advocate refuses to defend, from what he may *think* of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation puts the heavy inference of perhaps mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commends the very judge to be his counsel' (Erskine's Speeches, vol. i. 415).

It is precisely because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case. Archdeacon Paley fell into error on this point, when he included in his category of falsehoods which are not lies not only such instances as tales and romances, the conventional compliments of epistolary signature, and a prisoner's plea of 'not guilty,' but also 'an advocate asserting the justice or *his belief of the justice* of his client's cause[1].' This doctrine is the more astounding in a moral philosopher, assuming as it does that an advocate is justified in asserting his belief in his client's case, not only when he has such belief, but when he has not! The only true rule is that, as advocate, he must not express his personal opinion in any case.

A forensic advocate who pleads a cause the soundness of which he doubts, or disbelieves, is not in the same position as a party politician who votes in Parliament, or a speaker who appears on a public platform, in support of measures or objects which he disapproves. There is no moral obliquity on the part of the former such as indisputably exists in the case of the latter. Moreover, a lawyer's duties as an adviser differ *toto coelo* from his duties as an advocate. He is justified in giving his advocacy, though not his opinion, according as he is retained. The knowledge that an eminent lawyer has given an opinion on a case in a particular way, has, and rightly has, an effect altogether different, on the lay and the legal mind alike, from the knowledge that the same lawyer has been retained by one side to plead the same case in Court. As the private adviser of his client, a lawyer is bound to express to him his individual and honest opinion: as his advocate in a public Court he ought not to express that opinion to the Court whether it be for or against his client, and to do so is a distinct departure from his duty[2].

[1] Paley's Principles of Moral and Political Philosophy, vol. i. chap. xv, 'On Lies.'

[2] Brougham offended against this canon of advocacy when, in the exordium of his speech for Queen Caroline (1820), he said: 'It is not the magnitude of this case that oppresses me; with that I am borne up, and *cheered by the conviction of its justice which I share with all mankind.*' And again: '*I, knowing here there is no guiltiness to conceal . . .*' (Brougham's Speeches, vol. i. 103).

Previously, in 1792, on the prosecution of Thomas Paine for libels contained in 'The Rights of Man' the Attorney-General, Sir Archibald Macdonald, in opening the case to the jury went out of his way to contradict in extravagant terms an alleged rumour that his duty as a *public* prosecutor did not accord with his *private* judgment, and he accordingly referred to Paine as '*this enormous offender, as I consider him.*' Erskine resented these tactics in a spirited manner; and complained that the Attorney-General had thought fit 'to add the just weight of his private character to his public duty.' He went on to deal, in a fine passage, with the impersonality which should attach to an advocate. See p. 266, note 3, above. (Erskine's Speeches, i. 378, 414 sqq.)

Whenever an advocate asserts a thing as a fact he does so subject to the qualification—which is not the less real although unexpressed, and which the very capacity in which he appears is universally regarded as constituting an *ipso facto* implication—that he speaks according to his instructions, and not of his own knowledge or belief. If an advocate were to be permitted to express his personal opinion of the justice of his case, the interests of clients would often suffer. For it would follow that in cases where such an opinion was not, and could not honestly be expressed, the inference that his opinion was adverse would, and with good reason, be irresistibly drawn; just as a prisoner, who now has the opportunity of going into the witness-box to give his version of the case and refrains from doing so, runs a considerable risk of having his innocence suspected.

From what has been already said will also be seen the essential difference, too often overlooked, between the duties of an advocate and those of an expert witness. The latter is bound to express his honest personal opinion on the scientific or technical matters respecting which he is called upon to give his testimony. Hence it is that experts who lie—as possibly they occasionally do—not only arrogate to themselves the position of advocates with greater liberties than forensic advocates possess; but they are, as they have been aptly termed, advocates who have sworn solemnly that they will not be advocates.

The personal opinion of an advocate is wholly irrelevant to every issue in his client's case, which must be tried and determined solely *secundum allegata et probata*: in short—as every juror swears that he will determine it—'according to the evidence.'

Walter Savage Landor, though not a lawyer, and apt as he was to be dominated by monumental and imperious prejudices, never-

Again, in 1856 on the trial of Palmer, the Rugeley Poisoner, Serjeant Shee, in the opening of his speech for the defence, said:—'*I commence his defence,—I say it in all sincerity,—with an entire conviction of his innocence*,' &c. &c. The Attorney-General, Sir Alexander Cockburn, towards the close of his reply took occasion severely to rebuke, and vigorously to protest against, this personal declaration; which he described as 'strange,' and—less correctly, as the examples now given show,—as 'unprecedented.' He said, amongst many other things, that counsel for the defence 'had better have abstained from making any observations which involved the assurance of his own conviction.' (See 'Verbatim Report of the Trial of William Palmer at the Central Criminal Court before Lord Campbell L.C.J., Cresswell J. and Alderson B.' J. Allen, 1856. Seventh Day, May 21, 1856, at pp. 174–5; Tenth Day, May 25, 1856, at p. 306.) Serjeant Shee interjected 'not unprecedented'; and it is said that Lord Campbell was afraid to pull up the learned Serjeant, because he had himself committed the same error when at the bar; when, as Attorney-General for the defence in the *cause célèbre Norton* v. *Lord Melbourne*, he said: 'I declare to my God—I make the declaration in the most solemn manner—that this circumstance alone bears to my mind the most convincing proof of her innocence.' (Times, June 23, 1836, p. 4.) It is not a little significant that this passage is wholly omitted from the report of the speech in the edition of Lord Campbell's 'Speeches' (1842), prepared by himself for publication.

theless grasped the true principle upon which the administration of our law, and the practice of advocacy, is founded. Writing to Southey in 1820 on the subject of the trial of Queen Caroline, while expressing himself—judging from appearances, and from the queen's conduct at Como while he was a resident there—as never having 'entertained a doubt of her guilt and infamy,' he nevertheless, referring to the weakness of the *legal* evidence against her, said :—'Yet if a court of justice called on me to give evidence, I should give my evidence according to the orders and spirit of our laws, and say that, not knowing her guilty, I am not authorized to prejudice her: *proofs alone constitute guilt* [1].'

This leads me to speak of the famous, and even now greatly misunderstood, passage in the exordium of Brougham's speech in defence of the queen in her trial in the House of Lords. He began with a significant observation that was a covert threat, that he hoped it might not be necessary for him, in the faithful discharge of his professional duty, to set up a recriminatory case against the king, with the result that ignorant and thoughtless persons might be led thereby to impeach his loyalty as a good subject. But if, he added, he were disappointed in his expectation that the case against the queen would break down on the evidence, and so fall from its inherent weakness,

'Let no man vainly suppose, that not only I, but that any, the youngest member of the profession, would hesitate one moment in the fearless discharge of his paramount duty. . . . An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting *them*, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection [2].'

[1] Biography of Walter Savage Landor, by John Forster, p. 201.

[2] Brougham's Speeches, i. 103–5. Benjamin Disraeli's bitterly ironical and pungent criticism of this famous passage cannot be passed over here. Disraeli had, in a letter published in the Morning Post and other newspapers in 1838, made an extremely violent attack upon Mr. Austin for some remarks made by that gentleman as Counsel in opening the case for the petitioners in the Maidstone Election Petition against the return of Mr. Fector at the recent General Election. A criminal information for libel was thereupon filed against Disraeli; who appeared in person in the Court of Queen's Bench, pleaded guilty, and escaped punishment by making an apology. In the course of his speech he took occasion to quote with sarcastic approval the above passage, which he described as 'a sketch, by a great master, of the rationale of the duties of an advocate,' and one that was 'not the extravagance of a mere rhetorical ebullition.' 'My Lords,' he continued, 'I read this passage

It is difficult to understand how any one reading this passage in the light of its context, and of the historical events with reference to which it was uttered, could interpret it as spoken otherwise than with direct reference to the particular circumstances of the great case Brougham had in hand. He has himself explained, in an interesting private letter which he wrote in 1859[1], that his statement was anything rather than a deliberate and well-considered opinion on the general question of an advocate's duties. 'It was,' he says, 'a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. . . . and I am confident it would have prevented them from pressing the bill beyond a certain point[2].'

There is, however, good reason for supposing that Lord Brougham did hold wider views of an advocate's duty than generally obtain in the profession. For, nearly half a century afterwards, when speaking at the banquet given by the bar of England[3] in honour of the great French advocate M. Berryer, then the most illustrious in Europe, Lord Brougham compared him with our own Erskine. 'In both,' he said, 'he had noted that indomitable courage, which, in the interests of their clients, quailed neither before kings, nor courts, nor judges. In both was observed the first great quality of an advocate, *to reckon everything subordinate to the interests of his client.*' A few minutes later, the Lord Chief Justice, Sir Alexander Cockburn, in responding to the toast of 'The Judges of England,' took occasion to say:—

'My noble and learned friend Lord Brougham said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction—that

from an edition of the speech just published by the noble orator, who, satisfied with the fame that it has so long enjoyed, now deems it worthy of the immortality of his own revision, and has just published this description unaltered, after twenty years' reflection, and with its most important portions printed in capital letters.' *The Queen* v. *Disraeli, M.P.*, Times, Nov. 23, 1838, p. 6; and see 'The Case of the Queen v. Disraeli: With an Argument in Vindication of the Practice of the Bar.' By Joseph Stammers, Esq., Barrister at Law, 2nd edition, London (1839).

[1] To William Forsyth, Q.C., with reference to his criticism of Brougham's 'picture of the devotion which an advocate is supposed to owe his client' as 'the most highly coloured' that has been drawn. See Forsyth's Hortensius the Advocate, p. 389.

[2] 'When I said that it might be my painful duty to bring forward what would involve the country in confusion, I was astonished that everybody should have conceived recrimination to be *all* I intended. . . . The real ground was neither more nor less than impeaching the king's own title, by proving that he had forfeited the crown. He had married a Roman Catholic (Mrs. Fitzherbert) while heir-apparent, and this is declared by the Act of Settlement to be a forfeiture of the crown, "as if he were naturally dead."' Life and Times of Lord Brougham. Written by Himself, ii. 405–7. See further, Townsend's Modern State Trials, i. 253–64, containing some useful observations on our system of advocacy; and notes, pp. 312–3.

[3] In the Middle Temple Hall on November 8, 1864. See Times, November 9, 1864, and leading article; Law Times, November 12, 1864, pp. 16–18, and above, p. 264.

the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients *per fas*, but not *per nefas*: it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice.'

Lord Halsbury[1] was, I believe, the first to call attention to the fact that the key-note of this striking passage in Cockburn's speech, which has in its turn become almost as famous as Brougham's own words in his defence of the queen, is derived from Quintilian. The contrast of the arms of the warrior with those of the assassin is an almost literal transcript from the passage in which he says that teachers of oratory like himself will deserve nothing but ill of mankind, *si latroni comparamus haec arma non militi*[2]. In another passage, but changing the metaphor, he finely says that an advocate is not to throw open the haven of his eloquence as a port of refuge to pirates[3].

In these days, when as citizens we lead lives untroubled by constitutional disorders, and when it is almost as impossible to conceive of a conflict between the Crown and the people even in the most remote future as it is to-day, the independence of the bar is much more likely, as Lord Halsbury has more recently pointed out, to be needed in this country to resist not 'the *vultus instantis tyranni*, but the *civium ardor prava iubentium*, which in these days is the more serious, as it is the more overwhelming form of tyranny[4].' Writing to the same effect in the private letter already referred to, Lord Halsbury says:—

'When it is remembered that not abstract truth, but what is proved by legal evidence to be true is what courts of justice deal with, I think the proposition is not very difficult to adopt that Lord Brougham's overstatement is much nearer the truth than the tone of advocacy which should take into account what the popular side of the question would be; or, to put it in a more practical form, what the newspapers would say of the advocate next day. That he must not suggest what he knows or has good reason

[1] Speech at the annual dinner of the Birmingham Law Students' Society on January 2, 1892. (Unreported on this point.)

[2] The passage is worth quoting in full:—'Si vis illa dicendi malitiam instruxerit, nihil sit publicis privatisque rebus perniciosius eloquentia; nosque ipsi, qui pro virili parte conferre aliquid ad facultatem dicendi conati sumus, pessime mereamur de rebus humanis, *si latroni comparamus haec arma non militi*' (Quint. Inst. Orat., xii. i. 1).

[3] '*Neque defendet omnes orator, idemque portum illum eloquentiae suae salutarem non etiam piratis patefaciet*' (Quint. Inst. xii. 7, 4). Quintilian's standard of ethics in advocacy is puzzling enough to the modern reader. It is at times as absurdly high as it is at other times shockingly low. The apparent irreconcilability can only be explained by supposing his view to be that a good man in a good cause may do all manner of evil that good may come!

[4] At the annual dinner of the Hardwicke Society. Times, February 22, 1898.

to believe is false is obvious; but it is the advocate's duty to have primarily before his mind's eye that it is not his own but another's case he is arguing, and to reason earnestly and courageously for it, and not to be awed by the modern ogre who, without any responsibility, sits in his calm retirement and decides for everybody else what they ought to do.'

Let us consider a little more closely the negative side of the subject—what an advocate distinctly may *not* do. 'You are not to tell lies to a judge,' said Dr. Johnson, with vigorous terseness, in the conversation with Boswell already mentioned. Every advocate is bound by an unwritten but stringent bond of ethical obligation to take no undue advantage of his tribunal. Some advocates have stronger individualities, and, fortunately or unfortunately, are sometimes better lawyers than some judges before whom they appear. But there are no circumstances in which a counsel is justified in deliberately misrepresenting the law, either in matters of principle, precedent, or practice, to a judge who has a weak personality, or who is more ignorant than he ought to be, or who is new to his work, or who is unfamiliar with a particular branch of legal knowledge in which the advocate happens to be an expert. It goes without saying that he must not cite, or rely upon as existent, a statute which he knows to have been repealed; nor inform the Court that a statute cited by his opponent has been repealed, when he knows that it has been subsequently re-enacted; nor quote as an authority a decision which he knows has been expressly overruled. The caustic and cynical snub blandly administered to an adventurous advocate of this kind —I believe by Lord Westbury—'Avoid fallacious reasoning: you are sure, sooner or later, to be found out. Moreover, never misstate the *law*: the *facts* are always at your disposal,' is not without its significance. Nothing can ever justify the distortion of known facts; but to misrepresent the law may have as evil consequences as to pervert the facts. Legal and commercial business alike are conducted on the footing that legal principles and rules established by legislative or judicial authority, or by time-honoured custom, will be respected by the administrators and practitioners of the law. *Stare decisis* is a rule the indiscriminate departure from which would entail the most serious consequences. Conveyances are framed, wills made, titles quieted, and business generally transacted on the strength of established decisions. Courts, therefore, are not to be misled nor inveigled into wrong judgments by the misplaced ingenuity of advocates in order to gain victories for their clients in particular cases. If such forensic practices were to obtain generally, truth would be dishonoured and justice dethroned just as much as by the evil arts of suppression, distortion, mutilation, and

invention, which are universally regarded as indefensible in dealing with matters of fact.

There is one particular in which a difficulty not always easily solved sometimes presents itself. I refer to the case where an advocate in the course of his researches has found a decision which is, or which he believes to be, dead against him. What is his duty? In a recent civil case[1] counsel for the plaintiff is reported as saying at the opening of his argument: 'As the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the Court to certain cases which seem to raise a doubt whether the present action will lie.' In a still more recent criminal case where—on the argument of a case stated by a magistrate for the opinion of the Queen's Bench Division—the positions were reversed, and the convicted appellant alone appeared, Mr. Justice Channell, after observing upon the strange lack of authority upon the point at issue, and regretting that there was no argument for the respondent, added:—'Although of course we do not suggest that counsel for the appellant would not have brought any authorities before us that he knew of[2].' Of the propriety of the course indicated in these two cases there can, in such circumstances, be no doubt or question. The duty of counsel in all cases, civil or criminal, where only one side appears, clearly is to act as an assistant of the Court and as a minister of justice; just as counsel for the prosecution does, as we have seen, in criminal cases, even when the accused *is* represented.

But does the argument in the first of the two cases last mentioned imply that if counsel *had* appeared for the defendant, but through ignorance or inadvertence had omitted to call the attention of the Court to certain decisions apparently adverse to the plaintiff's contention and indistinguishable from his case, the plaintiff's counsel would have been absolved from any obligation to do so, especially if he believed that the previous decisions were wrongly decided? Even learned judges—who have felt themselves hampered by some decision of a superior court, or technically bound by the well established rule according to which judges are concluded by previous decisions of courts of co-ordinate jurisdiction—in order to do justice in particular cases, have been known to discover distinctions where there was little or no difference. It may be surmised that in practice the difficulty above mentioned rarely asserts itself in any very formidable way, and that most advocates find themselves in such a case, especially if the disconcerting decision is shortly reported, or is not to be

[1] *Cole* v. *Langford*, '98, 2 Q. B. 36.
[2] *Benford* v. *Sims*, '98, 2 Q. B. at p. 646.

found in the best reports, to be, more or less unconsciously, possessed of 'those admittedly large powers of distinguishing cases possessed by Sir George Jessel,' if I may borrow a phrase which was lately employed with more than a *soupçon* of judicial irony[1] to characterize that sublime disregard of authority which the great Master of the Rolls so often exhibited[2]. Small wonder then if an advocate at times exercise his forensic ingenuity in finding distinctions where there are no real differences, in some sort at variance with his inmost convictions, and yet without reproach.

Wholly different considerations apply to *obiter dicta*, especially if they be uttered *in arguendo* and do not occur in the judgment. *Obiter dicta*, though made *per curiam*, are, as often as not, made *per incuriam*. As Lord Bowen once observed, they not only, 'like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the judges who have uttered them; but are a great source of embarrassment in future cases[3].' They may often be simply disregarded. Indeed, some eminent judges have seen their way boldly and summarily to dispose of inconvenient *obiter dicta* as *nunquam dicta*[4].

A friend to whom I mentioned the subject recently, and who occupies a position which brings him into daily contact with many members of the Common Law and Chancery Bars, whose eminence in their profession and whose reputation for honour are equally indisputable, found on inquiry that the general opinion was that where, in civil cases, both sides are represented by counsel, there is no duty incumbent upon one side to assist the other, or to help the Court to make out a case adverse to themselves[5]. This conclusion is obviously based upon the view that litigation where

[1] Per Kekewich J. in *Re Jones, Christmas* v. *Jones*, '97, 2 Ch. at p. 202.

[2] Baron Bramwell once made the following inviting suggestion to counsel:—'Before you ask us to overrule these cases, Mr. P., had you not better try and distinguish them?' The learned Baron in taking this course was not improbably influenced by the fact that the cases in question were decisions of the Court of Appeal in Criminal Cases, and therefore final, and not open to review. However this may be, counsel took the hint, and, rising to the occasion, promptly replied:—'Then it is submitted that they are distinguishable.' *Reg.* v. *Sherwood* (1857) 7 Cox C. C. 272.

[3] (1889) *Cooke* v. *New River Co.*, 38 Ch. D. at pp. 70, 71.

[4] Thus, Lord Holt especially seems to have suffered many such things at the hands of his reporters, according to Willes C.J. in (1754) *Ellis* v. *Smith*, 1 Ves. at p. 13; to Lord Mansfield in (1758) *Miller* v. *Race*, 1 Burr. at pp. 457, 458; to Lord Kenyon C.J. in (1801) *Rex* v. *Higgins*, 2 East at p. 17; and to Lord Brougham in (1832) *King* v. *Turner*, 1 Myl. & K. at p. 463.

[5] His Honour Judge Whitehorne, Q.C., on the other hand, informs me that when he practised within the bar, he and the other leaders attached to Mr. Justice Chitty's Court always gave one another the authorities each knew of, both those they meant to cite and those they did not, mentioning any adverse decision to the opposing counsel as soon as it was obvious that he was unaware of it; and that this rule was invariably observed, and followed as of course. It may be that the Chancery practice of Q.C.'s being attached to particular courts, and so in daily and close touch with one another, has led in some cases to this comity of counsel.

both parties appear, or at any rate where they are equally matched by being professionally represented, is like a game or trial of skill in which, as in love and war, many things are fair, although they are in the nature of stratagems or concealments.

But all analogies are suspect, and this analogy of a game is to be applied charily. I venture to think that if a previous decision be found which is adverse and wholly undistinguishable—if, in other words, and to use a common expression, it 'hits the bird in the eye'—the only proper course in the general interests of justice is to bring it to the notice of the Court itself, if the other side fail to do so, and then to make the best of the situation. It is, however, confessedly a counsel of perfection, the practical exercise of which, while certainly to win for the advocate who is thus frank and candid the approbation and favour of the Court, and the grateful surprise of his opponents, is almost equally certain to lose him his client [1].

The advocate stands in his client's shoes, and is excellently well described as 'representing' him; for in the words of Quintilian, *utitur fictione personae, et velut alieno ore loquitur* [2]. But as a party appearing in person has no right to tell lies to the judge or jury, so neither is his professional representative justified in doing so for him. Counsel is in the *argot* of the criminal classes known as the prisoner's mouthpiece. But he ought never to sink his own individuality so far as to become the *alter ego* for all purposes of every knave who can find a guinea to employ him; and he is not bound, indeed he is bound not to employ knavish artifices in a knave's defence. He must never forget that the stream of his forensic eloquence should flow from him as through a purifying filter; and it behoves him to guard against opening the sluices of words regardless of evil consequences to others than his client; and he is not to regard himself, nor allow himself to be used—to borrow the expressive term applied to the old feoffee to uses—as a mere 'conduit pipe' for the transference of matter be it never so foul or vile. There are in all civilized communities well recognized rules of law as well as of war to which combatants are expected to conform; and all contests, whether in the forum or in the field, must be honourably conducted. All is not fair at law any more than in war. The savage who shoots poisoned arrows, and the soldier who fires explosive bullets, is or ought to be put under

[1] I lately asked a member of the bar, a man of the highest honour, 'What would you do if you were defending a man on a capital charge, and you were aware of a decision dead in point which had escaped the notice of counsel for the prosecution and of the judge at the trial, but which if disclosed would inevitably put the rope round your client's neck?' The only answer I received, accompanied by a significant look, was: 'I would rather not be placed in such a position.'

[2] Quint. Inst. Orat. xi. 1.

the ban of nations; and the advocate who attempts to poison the mind of a judge or of a jury with gross insinuations or groundless imputations deserves to be regarded equally as without the pale of honourable men.

It is a common ground of complaint against forensic advocates that they indulge not only in the *suppressio veri* but in the *suggestio falsi*. It may be conceded that the occasions are few and far between, if indeed they can ever arise, in which the *suggestio falsi* is excusable, much less justifiable. But, on the other hand, the *suppressio veri* may not only be well within the legal and moral rights of an advocate, it may even constitute his actual duty. That alone is legally *verum* which can be *proved* to be so, so as to justify a verdict—or *vere dictum*—'according to the evidence,' and to the rules of evidence which have been established in our courts of justice. Hearsay evidence may be, and often is, *verum*; but it is nevertheless the duty of an advocate who knows his work to suggest it, or object to it, according as it take the form of testimony available on behalf of, or tendered against his client. A confession, or admission, made to him by his client may be *verum*; but it would be an unpardonable breach of his duty towards the man who has placed himself in his hands, if he were, in order to forward what he may personally conceive to be the ends of justice in the abstract, or in the particular case, to disclose it without his client's knowledge or consent, and *a fortiori* if he did so deliberately against his wish.

At the famous trial in 1840, before Chief Justice Tindal and Baron Parke, of Courvoisier—the Swiss valet who was convicted and executed for the murder of his master, Lord William Russell—his counsel, the celebrated Charles Phillips, after defending him vigorously for eight hours with a firm conviction of his innocence, was thunderstruck by his client privately confessing his guilt to him in court. Phillips, on recovering from his first astonishment, replied, 'Of course, then, you are going to *plead* guilty?' and received for his answer, 'No, sir, I expect you to defend me to the uttermost.' Phillips's first impulse was to throw his client overboard: if he had done so he would undoubtedly have made shipwreck of his duty. By divulging the confession he would in a most unjustifiable manner have rebutted the presumption that the accused was innocent until he was *proved* to be guilty. He would have usurped the function of the judge and jury, have invested himself with powers of life and death over his own client, and inevitably have sent him to the gallows. Phillips's second thoughts were best. 'I had no right,' he said at a later period—when rebutting cruel and unfounded charges made against him in respect

of his conduct of the defence from that point—'I had no right to throw up my brief, and turn traitor to the wretch—wretch though he was—who had confided to me.' Phillips, as soon as the difficulty arose, privately consulted Baron Parke as to his duty in the circumstances. Baron Parke, on being distinctly informed that the prisoner insisted on his counsel continuing to defend him, unhesitatingly advised Phillips that he was bound to do so, *and to use all fair arguments arising on the evidence*[1]. It is always the duty of the prosecution, who have undertaken the burden of proof, to make out their case; and to suggest that it is the duty of a defending counsel to help them to do so in the interests of abstract justice, is not only wholly to misconceive the function of an advocate, but to advance a theory that is not likely to find support outside the jurisdiction of the courts of Utopia.

The same principles apply *mutatis mutandis* in civil as well as in criminal cases. In both there may arise occasions where to elicit the absolute truth would not be consonant with even the most doctrinaire and *a priori* theories of abstract justice. There are times when to practise a 'divine economy of truth' best serves the interests of justice: for even 'truth may,' as Lord Justice Knight Bruce once observed, 'like other good things be loved unwisely—may be pursued too keenly—may cost too much[2].'

Mr. Frederic Harrison supplies a striking illustration of this when he says that 'the man who should amuse himself by teaching a young child that its mother had committed adultery, might perhaps believe that he was disseminating truth, but he would be doing the work of the father of lies[3].' There are, it is to be hoped, few who are such purists in truth-seeking as to contend that it is the duty of an advocate who has undertaken the defence of a cruelly

[1] Whether Phillips exceeded these limits has been the subject of keen controversy. See The Mystery of Murder and Its Defence, Samuel Warren's Miscellanies, pp. 236–271. Warren, at p. 247, states that the trial was before Tindal C.J., 'Mr. Baron Parke sitting beside him'; and again, at p. 250, that 'Mr. Baron Parke sat during the trial beside the Chief Justice, but did not share in trying the cause.' This is an unaccountable mistake. In accordance with the practice, which obtained up to about the year 1856, for all the judges on the rota to sit together at the Central Criminal Court, both judges sat to try the case; and Parke B. took an active part in the proceedings, as appears from the report in Townsend's Modern State Trials, see at pp. 246, 253, 275. Sir Harry Bodkin Poland, Q.C., tells me that he personally knew nearly all the counsel engaged in the case (Adolphus, Bodkin, and Chambers for the prosecution; and Charles Phillips and Clarkson for the defence), and that he remembers being told by one of them that Parke B. was much annoyed at being informed by Phillips of the prisoner's confession. Tindal C.J., however, summed up the case to the jury; and did so without being told anything about the confession; and it was not till after the conviction that he first heard of it. For Courvoisier's full confession, see Annual Register, 1840, p. 236.

[2] *Pearse* v. *Pearse* (1846) 1 De G. & Sm. 25–26; and see S. T. Coleridge's Table Talk, under date October 27, 1831, Duties and Needs of an Advocate; see also under date January 2, 1833.

[3] The Choice of Books, by Frederic Harrison, p. 328.

wronged young mother, whom he honestly believes to be rightly charged with the murder of her base-born babe, to decline to strive to induce the jury to bring in a verdict of not guilty, or to find concealment of birth, instead of infanticide.

Innumerable particular cases might be put which would afford interminable discussion for casuists, as to the right course for an advocate to adopt *in foro conscientiae* as well as *in foro legis*. For instance, when a Statute of Limitations or the plea of infancy may properly be pleaded to defeat an otherwise just and indefeasible claim; when it is right to allow others to be prejudiced through ignorance of defects in a title to landed estates of which a client and his predecessors have been for a long period wrongfully in possession, but whom it would now be unjust for various reasons to dispossess; whether it be right to maintain silence concerning a document known to be improperly stamped, though the defect was originally due to the inadvertence of someone long since dead, and when, on the one hand not to expose the defect would defraud the Revenue, whilst on the other hand to expose it would bring incalculable trouble upon a blameless client; whether to assist in recovering from a good man, who is making a good use of it, property which really belongs to a bad man who avows that he intends, if and when he recover it, to apply it for illegal or immoral purposes; whether to argue on behalf of the validity of a harsh or cruel will which is known to express a malevolent testator's real intentions, although if it were invalidated greater justice would be done to more deserving persons. If, however, legal rights are to be respected at all, it would be both difficult and dangerous to allow any vague or general considerations of expediency or even of justice, real or supposed, to prevail over them. There are many perfectly legal acts, the doing of which is nevertheless wholly inconsistent with good taste, a fine sense of honour, and even morality; just as on the other hand the doing of an absolutely illegal act may, in some circumstances, be not only consistent with, but actually enjoined by the dictates of right feeling and of justice. The advocate cannot be expected to conform to a different or higher standard than that which the Court prescribes for itself. What the province of the Court is has been aptly expressed by a learned Lord Justice of Appeal as follows: 'We are not a court of conciliation, or a tribunal of honour. We are not made judges of prudence or of generosity . . . It is of the utmost importance therefore that we should not travel beyond our proper province[1].'

The saying that 'there is no wrong without a remedy' is, as the

[1] *Rickett, Smith & Co.* v. *Midland Railway Co.*, '96, 1 Q. B. at pp 264-5, per Collins L.J.

merest tyro in legal study knows, subject to the qualification that a man must show his right to it: in other words, his remedy must be consonant with and sought pursuant to the law of the land, whether substantive or of procedure. There can be no doubt that it is often an advocate's bounden duty to try to win according to the law, for a client who morally has no case on the merits [1]. A judge, too, is sometimes bound to sentence a prisoner, unexpectedly convicted by a jury, though he may not agree with the verdict, and even though he be personally convinced beyond doubt of the innocence of the accused. In this sense judges and advocates alike may safely say, 'Caesar did never wrong but with just cause,' in spite of Ben Jonson, who characterizes the utterance as being one of Shakespeare's 'things which were ridiculous and could not escape laughter [2].'

An eminent man of letters once said of an eminent statesman that his conscience, which should have been his monitor, had become his accomplice. That is a tendency against which an advocate especially should be upon his guard. But in the last resort, each man must be a law unto himself; and it is satisfactory to know that experience shows that honourable practitioners practically deal with thorny questions of forensic casuistry when they arise in a manner that gives the lie to the mediaeval saying, *Bonus iurista, malus Christa*. Lord Eldon, the doubting Chancellor, once characteristically but with truth observed that, in cases of doubt and difficulty, '*Quod dubitas ne feceris*' is a good rule for the regulation of their conduct both by counsel and solicitors [3].

'Law,' as Mr. Aubrey de Vere wrote long since, 'is not the rival of justice, but an instrument for the attainment of justice. It is impossible to construct such an instrument so that it should not, if used unrighteously, or even indifferently, work injustice. Thus we cannot forge a weapon to cut down an enemy which may not also be used to murder a friend; we cannot raise an altar on which it is impossible to sacrifice to idols; we cannot discover a medicine which malignity or carelessness may not convert into

[1] What frequently happens in practice is that a high-minded and honourable advocate so strongly presses his own view of his client's moral duty in private conference as practically to force him to submit. He generally does so; often reluctantly enough, and only because he does not relish the idea of going into court with an advocate who he knows is personally unfavourable to his claim, or his defence, as the case may be, and he has no time or opportunity to instruct another. As a rule the legal adviser who says 'I cannot control my client,' has no desire to do so. On the other hand, Quintilian observes that a client is undeserving of an advocate's assistance if he do not listen to his advice: '*Neque est dignus opera patroni qui non utitur consilio*' (Quint., Inst. xii. 7. 7).

[2] Ben Jonson, Discoveries, lxiv. Cf. Shaks., Julius Caesar, act iii. sc. i. 47.

[3] (1815) *Earl Cholmondeley* v. *Lord Clinton*, 19 Ves. at p. 267. This famous and interesting case is said to have been the only one Charles Butler, the eminent conveyancer and editor of Coke upon Littleton, ever argued at the bar.

a poison. In all such cases a good intention and good sense are supposed on the part of those who are to use the resources they find prepared for their hand[1].'

Is then the life of the advocate, which Bentham and others have drawn in colours so dark, incompatible not only with the dictates of honour and of truth, but with the first principles of morality and of religion? The unblemished lives of a long array of practitioners of the law, and of the profession of advocacy, during the centuries that have elapsed from Hale and More to Cairns and Selborne—I speak not of the living, though in their ranks shining examples are not wanting—men who have walked humbly before their God, whilst learnedly and strenuously maintaining the rights and defending the interests of those whose causes they were retained to plead; men who while making their intellect the slave of their purpose, have not subdued their conscience; the lives of such men are at once an everlasting memorial and an overwhelming argument to demonstrate the falsity of such a contention. The principles here sought to be set down as those which should guide every advocate in the performance of his daily duty are no impossible ideals, no counsels of perfection, no utopian models of excellence attainable only by men of light and leading. Every advocate, even the youngest, who has a right sense of honour, instinctively and almost unconsciously acts up to them one and all in the daily exercise of his great profession; until, by constantly putting them into practice, they are moulded into, and become part of his individuality, as inseparable from his moral and spiritual self as are the limbs of his physical body. There are at the present moment in the working ranks of the profession of the law hundreds of men who, in the honourable discharge of the duties they have undertaken to perform as the spokesmen of others in our Courts, are actuated by no different principles; men who could not for fee or reward of any sort or kind be induced for a single instant to yield to temptation, or to lower themselves to win the bread of shame by the arts of chicanery.

SHOWELL ROGERS.

[1] The Lawyer: His Character and Rule of Holy Life. By Edward O'Brien. Pickering. 1842. Introd. by A. de V. at p. xix. The passage above quoted may have been suggested by a passage in Quint. Inst. ii. 16. 5–6, which it much resembles. (The appendices to this volume form a valuable repertory of authorities on the subject of this paper.)

THE COMMONWEALTH OF AUSTRALIA BILL.

(Second Article.)

In a former article I have made some remarks upon the broad features and underlying principles of the Bill 'to constitute the Commonwealth of Australia,' which at the time of writing awaits the adoption of the various colonies, prior to its submission to the Imperial Parliament. Now I desire to refer to some points of detail in the Bill which seem to call for special notice. These are of varying importance and interest, but may probably best be discussed in the order in which they occur in the Bill itself.

The first, however, namely the provision in prefatory section 5, that 'the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth,' may be reserved until we reach the powers proposed to be conferred upon the Federal Parliament. The next section, then, which seems especially to invite remark is section 2, which provides: 'A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him'; and with this may be read section 61, 'The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this constitution and of the laws of the Commonwealth.' Now as to the first part of section 2, it is noteworthy that no power is conferred by the Bill on the Governor-General, as is the case in Canada [1], to appoint Lieutenant-Governors for the various provinces, though there is a clause taken almost verbatim from the Canadian Act, under which the Queen may authorize the Governor-General to appoint deputies within any part of the Commonwealth, and 'in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen.' Section 109, however, refers to the Governors of States, as the chief executive

[1] B. N. A. Act, 1867, s. 58.

officers or administrators of the State governments, and since it is provided (section 105) that 'the constitution of each State of the Commonwealth shall, subject to this constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State as the case may be, until altered in accordance with the constitution of the State,' presumably the intention is that the Imperial Government shall, for the present, at any rate, continue to appoint the Governors of the separate colonies or 'States.' If so, these State Governors will certainly be the Queen's representatives in the separate States for all purposes of State government. For a long time after confederation it was a moot point in Canada how far the provincial Lieutenant-Governors, appointed as they are by the Governor-General, were representatives of the Queen, some judges taking one view and some another; and it was not until 1892 that the Judicial Committee of the Privy Council set the matter finally at rest, by deciding[1] that 'a Lieutenant-Governor when appointed is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself for all purposes of Dominion government.' *A fortiori* this will apply to the Governors of the Australian States if they are to continue to be appointed by the Imperial government. Therefore, presumably, all that section 2 means is that for purposes of the government of the Commonwealth the Governor-General shall be Her Majesty's representative in the Commonwealth. In the Canadian Act there is no such express declaration, the Governor-General being merely described as 'carrying on the government of Canada on behalf and in the name of the Queen.'

Even if, as seems not impossible in view of the American proclivities displayed throughout by the framers of the Bill, what is contemplated is that each State shall ultimately elect or appoint its own Governor, such Governors might very probably still be held to be the representatives of the Queen, just as in the North-American proprietary colonies before the Revolution, Governors selected by the Proprietors, subject to the approval of the Crown, were held to represent the Crown.

Section 2 also provides, as has been seen, that the Governor-General shall have and exercise 'such powers and functions of the Queen as Her Majesty may be pleased to assign to him.' This clause is simply declaratory of the general law and practice throughout the empire under which, as Sir William Anson says in his work on the Crown, 'The Queen is represented in each colony by a Governor, who is appointed by commission, and who is limited

[1] *Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick*, '92, A. C. 437.

as to his powers by the letters-patent which constitute his office, and the instructions which inform him in detail of the manner in which his duties are to be fulfilled[1].' But its explanation in the Bill is no doubt to be found in the recent Victorian case of *Toy* v. *Musgrove*[2], in which the Chief Justice and one other judge upheld the contention raised that the Governor of Victoria was vested with all prerogative powers relating to the local affairs of the colony by virtue of the Constitution Act, though not expressly therein conferred, while the four remaining judges took the view that certain of such prerogatives and no others were by the Constitution Act and his commission conferred upon the Governor as representative of the Queen. The case was appealed to the Privy Council in England but went off on a different point[3]. A similar contention, however, was, curiously enough, about the time this case was decided in Australia, being raised by the Ontario Government in Canada[4], namely, that 'The Lieutenant-Governor is entitled *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters over which provincial legislatures have jurisdiction, as the Governor-General is entitled, *virtute officii*, and without any statutory enactment, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the federal parliament.' This theory also was mooted in a case in the Canadian courts still more recently[5]. It was not necessary, however, for the determination of the case that the point should be decided, and the contention was only supported by the *obiter dicta* of one judge. The matter may be deemed, perhaps, rather one of theory than of practical importance, but it is, I submit, a thing of importance in itself, when a thread of theory is discoverable in the constitutional law of the empire, to preserve it unimpaired, and it has always been held that a colonial governor under the British system is not a viceroy, but is vested with an authority limited by the terms of his commission and instructions, and of course by the terms of any valid statute conferring authority upon him, or regulating his powers. At any rate, the framers of the Australian Bill have deemed the matter of sufficient importance to make an express declaration with regard to it.

Passing on to the provisions relating to the constitution of the Federal Parliament, I referred in my former article to the democratic character of the Senate. In accordance with the same democratic spirit the House of Representatives (section 28) is to continue only for three years from the first meeting of the House, whereas the

[1] 1st ed. at p. 260.
[2] 14 Victoria Law R. 349.
[3] '91, A. C. 272.
[4] Ontario Sess. Pap. 1888, No. 37, pp. 20–2.
[5] *Attorney-General of Canada* v. *Attorney-General of Ontario*, 22 Ont. R. 222, 19 Ont. App. R. 31, 23 Sup. Ct. R. 458.

Dominion House of Commons continues for five years[1]. In this part of the Bill two provisions tending to purity of government are to be noticed which are not embodied in either the United States or the Canadian constitution, although an Act of the Dominion Parliament excludes from the House of Commons and the Senate persons undertaking any contract for which money is to be paid by the government of Canada. Under section 44, any person is to be incapable of being chosen or of sitting as a senator or a member of the House of Representatives 'who has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons,' and by section 46, if any such person does so sit, he shall, for every day on which he so sits, be liable to pay £100 to any person who sues for it in any court of competent jurisdiction. And under section 45, if a senator or member of the House of Representatives 'directly or indirectly takes or agrees to take any fee or honorarium for services rendered in the Parliament to any person or State,' his place shall thereupon become vacant. Comment has arisen before now in Canada over cases in which certain members of the Dominion Parliament were supposed to receive fees from powerful railway companies for working in their interests in the House. Probably, however, in every legislative body there are lawyers of eminence who take large retainers from corporations or individuals, although the discharge of their duties as members of parliament may be thereby influenced or affected; and this section of the Commonwealth Bill obviously does not touch that matter.

To continue, section 49 also calls for a word of notice. Under it 'the powers, privileges, and immunities of the Senate and of the House of Representatives and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom and of its members and committees at the establishment of the Commonwealth.' The Australian Federal Parliament is thus not to be subject to the peculiar restriction imposed in this respect upon the Dominion Parliament, the existence of which, so far as I know, has never been satisfactorily explained, and by which, though that Parliament may define by Act the privileges, immunities, and powers to be held, enjoyed, and exercised by its members, it can only do so so that the same shall never exceed 'those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United

[1] B. N. A. Act, 1867, s. 50.

Kingdom of Great Britain and Ireland, and by the members thereof[1].' This restriction in Canada seems all the more anomalous because the Judicial Committee decided in 1896[2] that the various provincial legislatures may, under the power given them[3] to 'amend the constitution of the province, except as regards the office of Lieutenant-Governor,' pass Acts for defining the powers and privileges of the provincial legislatures, free from any such restriction.

We now come to the sections conferring legislative powers, and the large number of federal powers specified, thirty-nine as against twenty-nine in Canada[4], is no doubt to be accounted for by the fact that no general power of legislation, as in Canada, is conferred upon the Federal Parliament. Of the powers thus to be granted to the Parliament of the Commonwealth the first two, viz. those over (1) 'trade and commerce with other countries, and among the States,' and (2) 'taxation; but so as not to discriminate between States and parts of States,' are obviously taken from the constitution of the United States, by preference to that of Canada. The first, which by virtue of section 97 'extends to navigation and shipping, and to railways the property of any State,' is similar to the power of Congress 'to regulate commerce with foreign nations, and among the several States,' and differs from the power of the Dominion Parliament to make laws 'in relation to the regulation of trade and commerce,' extending as the latter does not only to external but to internal trade and commerce, though in its construction the broad comprehensiveness of the words has to be limited by reason of certain powers conferred upon the provincial legislatures in Canada over matters closely connected with the operations of trade and commerce. The second of these powers recalls that given to Congress to lay and collect taxes, duties, imposts, and excises, but so that 'all duties, imposts, and excises shall be uniform throughout the United States[5],' and, also, the other provision in the United States constitution, that 'representative and direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers[6],' and differs from the broad unfettered Dominion power to make laws in relation to 'the raising of money by any mode or system of taxation.'

And I may observe generally that the framers of the Australian Bill show a tendency, characteristic also of the United States constitution, and in a constantly increasing degree of the various State

[1] Imp. 38-39 Vict. c. 38, amending B. N. A. Act, 1867, s. 18.
[2] *Fielding* v. *Thomas*, '96, A. C. 600, at pp. 610-1.
[3] B. N. A. Act, 1867, s. 92, No. 1.
[4] These Dominion powers are to be found in section 91 of the B. N. A. Act, 1867.
[5] Art. 1, s. 8 (1). [6] Art. 1, s. 2 (3).

constitutions in America, to fetter the free use of legislative powers conferred. Thus the very next federal power conferred on the Commonwealth Parliament is to make laws with respect to 'bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.' In like manner section 55 provides that 'laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect,' and that such laws 'except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only': while section 98 says that 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof'; and section 115, in marked similarity to a provision in the constitution of the United States, enacts that 'the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' On the other hand, the framers of the Canadian Federation Act, in conformity with their expressed desire to adhere to the principles of the British constitution so far as was possible under federal conditions, when conferring legislative powers whether on Dominion Parliament or provincial legislatures over specific subject-matters, conferred them absolutely, and unfettered by any such restrictions. The British Parliament is supreme, and the British North America Act made Canadian legislatures also supreme over the internal affairs of Canada, each within its own sphere of jurisdiction. None of the distrust of legislatures, which is a marked and increasing American characteristic, is shown in the Canadian constitution, but it is to a considerable degree displayed in the Australian Bill.

Returning to the list of powers conferred upon the Parliament of the Commonwealth, there follow a number which are almost identical with the powers possessed by the Dominion Parliament, and in most cases also by Congress, namely, to make laws with respect to 'borrowing money, on the public credit of the Commonwealth,' 'postal, telegraphic, telephonic, and other like services' (the Canadian power is confined to postal services, and that of Congress to establishing post offices and post roads), 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth' (but by section 68 the command-in-chief of

the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative; in Canada it is declared 'to continue and be vested in the Queen[1]'), 'lighthouses, lightships, beacons and buoys,' 'quarantine,' 'census and statistics,' 'currency, coinage, and legal tender,' 'banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money' (all banking is exclusively a Dominion subject in Canada), 'weights and measures,' 'bills of exchange and promissory notes,' 'bankruptcy and insolvency,' 'copyrights, patents of inventions and designs, and trade marks,' 'naturalization and aliens,' 'marriage, divorce and matrimonial causes' (which last is a wise preference of the Dominion over the United States precedent), 'immigration and emigration,' and 'the influx of criminals.'

In connexion with this list it is to be noted that, as in the United States, the general criminal law is not made a Federal subject, though it is so in Canada, but, as it is provided that the Commonwealth Parliament may make laws with respect to 'matters incidental to the execution of any power vested by this constitution in the Parliament or in either House thereof,' presumably this would authorize criminal provisions in respect to all federal matters. It must also be remembered with regard to the above list that, as already pointed out, where powers in relation to such matters are conferred upon the Dominion Parliament, they are conferred exclusively, so that the provincial legislatures may not legislate upon them at all, whereas the above powers of the Australian Parliament are not thus exclusive, any more than those of Congress, though in the latter two cases federal laws when made override State laws *in pari materia*.

In addition to the above Federal powers in the Australian Bill are the following, which are not to be found among the specific powers of the Dominion Parliament, though they might probably all come within the general power of legislation over non-provincial subjects possessed by the latter. These are powers to make laws with respect to 'astronomical and meteorological observations,' 'insurance other than State insurance; also State insurance extending beyond the limits of the State concerned,' 'invalid and old-age pensions,' and 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.' Power is also given to make laws in respect to 'the control of railways with respect to transport for the naval and military purposes of the Commonwealth,' and, as already mentioned, by section 97 the power of Parliament over trade

[1] B. N. A. Act, 1867, s. 15.

and commerce is made to extend to 'railways the property of any State.' But no such general control of all railways, steamship lines, and other works and undertakings is given as that conferred on the Dominion Parliament, which not only has exclusive power to make laws in relation to all 'lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province,' and 'lines of steamships between the province and any British or foreign country,' but also in relation to 'such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.' Thus by simply making such a declaration the Dominion Parliament can assume sole jurisdiction over any railway, steamship line or other works, though altogether situate within the limits of a single province.

Next, however, I will refer to two powers assigned to the Commonwealth Parliament of far-reaching importance, which could not, I think, in their fullness be assumed by the Dominion Parliament under its general legislative power, and which are certainly not among its enumerated powers. I refer to the powers given to make laws in respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth,' and to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.' No doubt, however, if Canada had been as attractive to Chinese, Indian coolies, and labourers of other dark races, as some parts of Australia, the same power would have been conferred upon the Dominion Parliament to make laws in relation to them, as it has to make laws in relation to Indians.

The chief point of interest, however, as it seems to me, with regard to the Federal powers provided for in the Australian Bill, still remains to be noticed, namely, the apparently extra-territorial character of some of them. I refer to the powers to make laws with respect to 'fisheries in Australian waters beyond territorial limits,' 'external affairs,' 'the relations of the Commonwealth with the islands of the Pacific,' and in connexion with these, the provision in prefatory section 5 that 'the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and port of destination are in the Commonwealth.' If the conferring of these powers on the Parliament of the Commonwealth is sanctioned by the Imperial Parliament it will mark an important new departure, for they

clearly invade what has hitherto been deemed the Imperial area of power, as distinguished from that of even self-governing colonies. The Dominion Parliament has power to make laws in relation to 'sea, coast, and inland fisheries,' a power discussed in the very latest Canadian appeal before the Privy Council in England [1], but it has never been contended that such legislation would be effective beyond the three-mile limit, unless over what I may term 'subjects of the colony,' to which exception I will refer again presently. Only a year or two ago the territorial limit was recognized by the Supreme Court of Canada in the case of the ship *Frederick Gerring* [2], and in a volume of Newfoundland decisions, published in 1897 [3], are two upon the point that the territorial limits of the jurisdiction of the local legislature extend to, but not beyond, three miles outside of a line drawn from headland to headland of the bays of Newfoundland. And in 1891, on a New South Wales appeal [4], the Judicial Committee said: 'their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *extra territorium jus dicenti, impune non paretur* would be applicable.' So with the clause above referred to giving the laws of the Commonwealth force on all British ships, it will be seen that it does not confine the application of such laws to periods when the ships shall be within Australian waters. Indeed, if the three-mile limit is not to apply, it will be difficult to say what are Australian waters, for the Bill contains no definition on the point. Now the Imperial Merchant Shipping Act, 1869, by clauses re-enacted in 1894, gave the legislatures in all British possessions the right to regulate the coasting trade of such British possessions respectively, provided such Acts contain suspending clauses to the effect that they shall not come into operation until Her Majesty's pleasure thereon has been publicly signified, and shall be subject to existing treaties with foreign States, and shall treat all British ships alike. Moreover, the Dominion Parliament, having legislative power over 'navigation and shipping,' in 1868 passed an Act respecting the navigation of Canadian waters, regulating the use of lights, fog signals, steering and sailing, &c., with a view to preventing collisions, and such legislation is in force still with amendments made from time to time to keep in touch with regulations of the Home Government in like matters, and its validity in reference to ships while in Canadian waters has been upheld by the Judicial Committee in the case of the ship *Hibernian* [5]. But such legislation

[1] *Attorney-General of Canada* v. *Attorney-General of Ontario*, '98, A. C. 700.
[2] 27 Sup. Ct. R. 271.
[3] J. W. Withers, Queen's Printer, St. John's, N. F.
[4] *Macleod* v. *Attorney-General for New South Wales*, '91, A. C. at pp. 457-8.
[5] L.R. 4 P. C. 511.

does not assume to extend beyond the three-mile limit, and if the powers referred to in the Australian Bill come into force they can, I submit, only apply beyond territorial limits to those whom I have referred to as subjects of the Commonwealth. The expression 'subject of a colony' occurs in a judgment of Sir G. J. Turner L. J., in 1865, in a case of *Low* v. *Routledge*[1], and is, I think, significant, because in view of the plenary nature of colonial legislative powers under our system, colonial legislatures must have, it would seem, the same power to bind domiciled inhabitants of their respective colonies, wherever they may be and wherever they may temporarily go, as the Imperial Parliament, by virtue of its paramount authority, would have to bind all British subjects everywhere[2]. That is to say, if such 'subjects of the colony' were, to use another expression from a Privy Council judgment, 'caught within the colony[3]' they might be prosecuted for offences under the laws of the colony, and such laws could not be held *ultra vires* in their application to them, merely because the offences in question were committed outside the territorial limits.

But in the case of the powers over 'external affairs,' and 'the relations of the Commonwealth with the islands of the Pacific,' we pass to larger matters. When the British North America Act gave the Dominion Parliament 'exclusive' power to legislate over certain subjects such as copyright, it was at an early date after confederation held by some Canadian judges that this meant 'exclusive of the Imperial Parliament.' The course of legal decision has, however, quite set that contention at rest, and 'exclusive' has long been definitely decided to mean only 'exclusive of the provincial legislatures,' and not to refer at all to the paramount power of the Imperial Parliament to legislate for Canada as well as other British possessions on the subjects referred to if in its wisdom it sees fit[4]. That construction of the Act was easy and obvious, because while it conferred, as has been said, some powers 'exclusively' on the Dominion Parliament, it conferred others 'exclusively' on the provincial legislatures. But in the Australian Bill no powers are conferred on the State Legislatures; their powers are left intact except so far as affected by the powers conferred on the Parliament of the Commonwealth. If, then, the present Bill is sanctioned as it stands by the Imperial Parliament, and the two powers referred to are conferred in the naked, absolute way they appear in the Bill on the Commonwealth Parliament, it will not be so easy to construe them

[1] L. R. 1 Ch. at p. 46.
[2] The point is also dealt with in the very recent Canadian case, *Re Criminal Code Sections relating to Bigamy*, 27 Sup. Ct. R. 461.
[3] *Macleod* v. *Attorney-General for New South Wales*, '91, A. C. at p. 457.
[4] *Smiles* v. *Belford*, 23 Grant 590, 1 Ont. App. R. 436 (1876).

as merely meaning that as between that Parliament and the State legislatures the former can legislate as to 'external affairs,' and 'the relations of the Commonwealth with the islands of the Pacific.' It will look, I should submit, as though the Imperial Parliament intended, so long as the Commonwealth Bill should remain unrepealed, to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament; and the Imperial Parliament has never yet repealed an Act conferring constitutional powers on a colony except to extend those powers, or else at the request of the colony as in the case of Jamaica in 1866.

Leaving the subject of the Federal powers specified in the Commonwealth Bill, and merely observing that under section 59 only one year is allowed for the exercise of the Imperial veto power over Acts of the Commonwealth, whereas two years are allowed in Canada, and one would suppose at least an equal length of time should be allowed on Acts coming from Australia, I may pass over the portions of the Act relating to the Judicature, having already called attention to them in my former article, and proceed to section 87, which provides that, 'Of the net revenue of the Commonwealth from duties of customs and of excise, not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall, in accordance with this constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.' If the aversion to direct taxation is as strong among Australians as it is among Canadians, this is practically much the same as saying that the Federal Parliament shall only have the use of one-fourth of the revenue raised by it for Federal purposes, and seems to be another indication of that distrust of Parliament which appears elsewhere in the Act as already pointed out. Under the Canadian Act each province is entitled to receive from the Dominion annually a sum named in the Act, and differing in the case of different provinces, plus a *per capita* grant, for the support of their governments and legislatures, and the rest of the Dominion revenue is at the disposal of the Dominion Parliament[1].

Passing on, section 92 of the Bill contains the important provision that 'on the imposition of uniform duties of customs' (which by section 88 shall come within two years after the establishment of the Commonwealth), 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.' The corresponding provision in the

[1] B. N. A. Act, 1867, s. 118.

Canadian Federation Act runs: 'All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.'

In section 100 we find another American institution which is to be imported into federated Australia, namely the Inter-State Commission. The section says: 'There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this constitution relating to trade and commerce, and of all laws made thereunder.' The members of this commission are (section 102) to be appointed by the Governor-General in Council, to hold office for seven years, subject to removal on address from both Houses of Parliament on the ground of proved misbehaviour or incapacity, and are to receive such remuneration as Parliament may fix. By section 101, Parliament may forbid, as to railways, any preference or discrimination by any State if undue and unreasonable, or unjust to any State, but no preference or discrimination shall be so deemed unless so adjudged by the Inter-State Commission. This part of the Bill is clearly suggested by the Act of Congress known as the Inter-State Commerce Act, 1887, which created a similar commission, to be known as the Inter-State Commerce Commission, to be composed of five paid commissioners to be appointed by the President, with the consent of the Senate, and with authority, subject to the provisions of the Act, to inquire into the management of and control the conduct of the business of all common carriers engaged in the transportation of passengers or property by railroad, or partly by railroad and partly by water, from State to State, or from the United States to foreign countries, and which Act also provides against differential charges in favour of certain persons or places against other persons or places. It would seem, however, from section 100 above quoted that it is in contemplation to give the Australian Inter-State Commission far wider functions and powers than those of the American Inter-State Commerce Commission. There is no similar institution in Canada, though by law all railway tolls are required to be charged, under the same circumstances, equally to all persons, and the Railway Committee of the Canadian Privy Council has powers to regulate the running and construction of railways.

The last section in the Bill which seems to call for special mention is the final one, section 127, which allows amendments to the Constitution to be made by a law passed by an absolute majority of each House of the Federal Parliament, which is to be submitted to the electors in each State qualified to vote for members of the House of Representatives, not less than two nor more than six

months after its passage; and 'if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.' But 'an alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, shall not become law unless the majority of the electors voting in that State approve the proposed law.' This is an easier method of amending the constitution than that prescribed in the constitution of the United States, under which such amendments first require the support of two-thirds of both Houses of Congress, or else of the legislatures of two-thirds of the several States, and then must be ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress [1]. The Dominion Parliament on the other hand has no express power given it to amend the constitution of Canada, though it has been suggested that it might do so under its general power to make laws for the peace, order, and good government of Canada on non-provincial subjects. The provincial legislatures in Canada, however, as I have already stated, have an express power to amend the constitution of the province, except as regards the office of Lieutenant-Governor, which doubtless is excepted as being a link of federal and also of imperial power.

I have now, I think, touched upon all points of special interest arising on the Commonwealth of Australia Bill, and may perhaps in conclusion be allowed to express the hope that either under this or some other Bill, confederation will speedily become an accomplished fact, and show us, so far as compatible with Imperial union, in words of the late Sir George Grey, 'for the first time in the world's history, a continent for a nation, and a nation for a continent.' Certainly the conviction of the framers of the British North America Act, expressed in the preamble, that the union of the provinces in one Dominion would 'promote the interests of the British Empire' has been amply verified. Confederation has enabled Canada to contribute to imperial defence that great military highway, the Canadian Pacific Railway; and so far from the union of the provinces weakening the connexion with Great Britain and the Empire, never, I am convinced, was that connexion more firmly established or dearer to the hearts of the people.

A. H. F. Lefroy.

[1] Art. 5, s. 1.

WHAT IS A TRUST?

IN law as in all other human sciences—it has been said [1]—those ideas which seem to be most simple are really the most difficult to grasp with certainty and express with accuracy. It is perhaps not surprising therefore that the definition of fundamental terms has always proved a matter of difficulty to lawyers; so much so that they have come to look askance at all efforts in this direction—a frame of mind that has found expression in the maxim 'omnis definitio in jure periculosa est.' Nevertheless in order to attain clear ideas definitions are essential; and this is no less so in the law of trusts than in any other branch of our law; before the scope and detail of the subject can be known it must be determined what the nature and definition of a trust is. Now a great number of attempts to define a trust are to be found in our law books, but it cannot be said that any of them is entirely satisfactory. The following are the most important of them placed in their chronological order:—

Lord Hardwicke (1734)[2]: 'A trust is when there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this Court' [i. e. of course the High Court of Chancery].

This definition accentuates one of the most striking characteristics of a trust at the time at which it was enunciated, but though frequently cited by later writers[3], is obviously insufficient at a time when the distinction between Courts of Equity and Courts of Law has ceased to exist in England. It only regards two of the peculiar features of a trust, neither of which is now essential. It makes no allusion to the fact that a trust is concerned only with property[4], nor to the separation between the beneficial and legal ownership of that property, nor to the obligation to which it gives rise. It was in fact framed merely to emphasize a point in the case then under discussion.

Mr. Justice Story (1835)[5]: 'A trust in the most enlarged sense

[1] Pollock, First book of Jurisprudence, 1.
[2] *Sturt* v. *Mellish*, 2 Atk. 211.
[3] e. g. Holland, Jurisprudence, 6th ed., 218.
[4] *In re Barney*, '92, 2 Ch. 265.
[5] Story, Equity Jurisprudence, 2nd Eng. ed., § 964.

in which the term is used in English Jurisprudence, may be defined to be an equitable right, title or interest in property real or personal, distinct from the legal ownership thereof.'

This definition was adopted by Brett L.J. in the case of *Wilson* v. *Lord Bury* (5 Q. B. D. 530), but as pointed out by Mr. Underhill (Law of Trusts and Trustees, 4th ed., 3), and by Mr. H. A. Smith (Principles of Equity, 2nd ed., 23), it is rather a definition of the interest of the person in whose favour a trust is created than of the trust itself, and omits to take account of special trusts in which the object of the trust is the performance of some particular obligation rather than the vesting of the beneficial ownership in some person other than the legal owner.

Mr. Lewin (1837)[1]: 'A trust in the words applied to the use [i. e. by Coke, Lit. 272 b] may be said to be "a confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land and to the person touching the land, for which cestui que trust has no remedy but by subpoena in Chancery."'

This does not profess to be anything more than an adaptation of Coke's definition of a use, and is rightly regarded by Mr. Underhill (Trusts and Trustees, 4th ed., 2) as defective (1) in being confined to trusts of land, (2) in conveying the impression that the trustee must be some other than either the person who creates the trust, or the beneficiary under it, and (3) in that the subpoena in Chancery has long since become obsolete.

Mr. Wharton (1848)[2]: 'A trust is simply a confidence reposed either expressly or impliedly in a person (hence called a trustee) for the benefit of another (hence called the cestui que trust or beneficiary), not however issuing out of real or personal property, but as a collateral incident accompanying it, annexed in privity to (i. e. commensurate with) the interest in such property, and also to the person touching such interest, for the accomplishment of which confidence the cestui que trust or beneficiary has his remedy in equity only.'

This is evidently based on Mr. Lewin's work, and though a considerable improvement on his effort is open to the second and third objections urged against it above. It is moreover undesirably long for a definition, and the precise meaning—if indeed there be

[1] Lewin on Trusts, 9th ed., 11.

[2] Wharton, Law Lexicon, 9th ed., s.v.

one—of the words 'not however issuing out of real or personal property, but as a collateral incident accompanying it annexed in privity to (i. e. commensurate with) the interest in such property, and also to the person touching such interest,' is by no means clear.

Judge J. W. Smith (1849)[1]: 'A trust ... is a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the possessory and legal ownership thereof.'

And

Mr. Snell (1868)[2]: 'A trust ... is a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the legal ownership thereof.'

This definition is attributed by Messrs. Snell, H. A. Smith, and Underhill, erroneously it would seem, to Mr. Spence (at any rate it is not to be found at 2 Sp. 875 cited by them). It appears to have been either devised by Judge Smith, or to have been adopted by him from Mr. Justice Story, and is subject to the same criticism as the definition of the latter.

The draft Civil Code of the State of New York (1865) defines a trust as follows:—'§ 1167. A trust is either (1) voluntary, or (2) involuntary. § 1168. A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another. § 1169. An involuntary trust is one which is created by operation of law.'

This short definition fails to mark the fact that a trust is concerned with property merely, and it seems to imply that the trustee must be somebody other than the creator of the trust, and that the trustee cannot himself be a beneficiary. Apart from these defects, however, it is undoubtedly good.

Mr. Watson (1873)[3]: 'A trust may be described generally as an obligation affecting property legally vested in one or more (the trustee or trustees) which obligation he is or they are bound to perform, wholly or partially for the benefit of another or others (the cestui que trust or cestuis que trust) in whom the equitable estate is vested.'

Mr. Watson's definition is a distinct advance on the efforts of

[1] Smith, Manual of Equity, 13th ed., § 224.
[2] Snell, Equity, 12th ed., 53.
[3] Watson, Compendium of Equity, 2nd ed., 959.

earlier text-book writers, but is subject to the objection that the trustee is not necessarily the legal owner of the trust property; he may, for example, be trustee of a mere equity, like an equity of redemption, or an equitable interest arising under another trust (see Underhill, Trusts and Trustees, 4th ed., 4). It is also silent as to the difference between express and implied or constructive trusts.

Mr. H. A. Smith (1882)[1]: 'A trust is rather a duty deemed in equity to rest on the conscience of a legal owner. This duty may be either passive, such as to allow the beneficial ownership to be enjoyed by some other person named the cestui que trust, in which case the legal owner is styled a bare trustee; or it may be some active duty, such as to sell or to administer for the benefit of some other person or persons; such as the duties of a trustee in bankruptcy.'

The objection to this is that it is at once too wide and too narrow. Too wide because it would be almost if not quite as good a definition of any other equitable obligation; and too narrow because, as shown above, a person may be a trustee without being the *legal* owner of property. The introduction of the word 'duty' is also open to objection (see Anson on Contracts, 8th ed., 6).

The Indian Trusts Act, 1882, s. 3: 'A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.'

This statutory definition is interesting, but was framed of course with special reference to the law of India, and is not entirely suitable to English law. It omits to take account, for instance, of the fact that the author of the trust may be himself the trustee and does not pretend to cover implied or constructive trusts, which indeed are separately dealt with in later sections of the Act.

Mr. Underhill (1888)[2]: 'A trust is an equitable obligation, either expressly undertaken or constructively imposed by the Court, under which the obligor (who is called a trustee) is bound to deal with certain property over which he has control (and which is called the trust property) for the benefit of certain persons (who are called the beneficiaries or cestuis que trust) of whom he may or may not himself be one.'

[1] Smith, Equity, 2nd ed., 23.

[2] Underhill, Trusts and Trustees, 4th ed., 1.

Mr. Underhill's is undoubtedly the best definition yet given, but even his is not beyond criticism. It is not satisfactory, for example, in an analytical definition, to insist on the fact that the obligation is 'equitable.' The fact that trusts were enforceable only in Courts of Equity and not in Courts of Law is in this country a matter of history merely, and cannot at the present time be said to be one of their distinguishing marks. Further, it is scarcely accurate to distribute all trusts into the classes of those 'expressly undertaken' and constructive trusts. The trustee (save when the author of the trust constitutes himself a trustee), even in the case of express trusts, generally does not *express* his assent to undertake it. It would be more correct to distinguish between trusts which are *imposed* expressly and constructive trusts.

Lord Justice Lindley (1897)[1]: 'A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of Equity.'

This is substantially the same as Lord Hardwicke's given above, and is subject to the same objections as his.

Now in order to construct a definition which shall not be open to the criticisms urged against those set out above it is necessary to inquire what are the distinguishing marks of a trust, for the definition should include all those and none others. 'A definition in order to be satisfactory ought to give with precision the marks whereby the thing to be defined is distinguished from all other things[2].'

For this purpose it is advisable to see in the first place what relation the law of trusts bears to other branches of our law.

Now there can be no doubt that a trust possesses some characteristics which are closely analogous to those of a contract[3]. This analogy is specially marked in the case of that class of contracts known as bailments. These indeed are not infrequently spoken of as trusts (see e. g. Blackstone, Comm. iii. 432), and it is almost impossible to distinguish a depositum bailment from what is sometimes called a simple trust. It is common usage to speak of a depositee as a trustee (see e. g. *Lord Hollis's* case, 2 Vent. 345; the judgment of Holt C.J. in *Coggs* v. *Bernard*, 1 Sm. L. C., 10th ed., 167; and both argument and judgment in *In re Tidd*, '93, 3 Ch. 154), and authority may even be found for extending this to all

[1] *In re Williams*, '97, 2 Ch. 19.

[2] See Pollock on Contracts, 6th ed., 195; Anson on Contracts, 8th ed., 8; Enc. Brit., Art. 'Trust'; Enc. Eng. Law, Introd., vol. i. 11; Underhill, Trusts and Trustees, 4th ed., 5.

[3] Lawrence, International Law, 1.

bailments. Thus it is stated by Mr. Justice Story in his work on Bailments (8th ed., note at the foot of p. 8) that 'a bailment is strictly a trust in the common judicial sense of the word'; and he quotes a passage from Comyns' Digest (Chancery, 4 W. 5), in which it is even said that 'if a man give goods upon trust to deliver them to a stranger, Chancery will oblige him to do it,' which apparently amounts to saying that Equity would enforce the duties of a bailee as though he were a trustee of the goods carried by him. Conversely we find another eminent writer, Sir William Markby[1], admitting the question why the liability of a trustee should not be considered a contractual liability, to be one to which he does not find any clear answer.

On the other hand, historically speaking, there is of course an immense distinction between contract and trust. The one is the creation of common law, the other of equity; and in the old days, when courts of law and equity were distinct tribunals, probably no one would ever have felt any doubt (in spite of the dicta of Story and Comyns cited above) but that a bill in equity against a bailee would be bad for want of equity. Even at the present time, when the differences between the old jurisdictions have become obscured, one cannot but feel that it is going to an extreme to speak of some kinds of bailees, say e.g. common carriers, as trustees of the goods bailed to them[2]. It seems desirable therefore that the definition of a trust should if possible be so narrowed as to prevent its confusion with a bailment in particular, and all other classes of contract in general. But it is not satisfactory to make what is purely a matter of history a basis of the distinction. An endeavour should be made to find a logical rather than an historical difference if possible.

Dr. Whitley Stokes[3] purports to have effected this in the Indian Trusts Act by making his definition emphasize the fact that the obligation of the trust is annexed to the *ownership* of the property, and arises out of a *confidence* reposed in and accepted by the owner, or declared and accepted by him. But this is not satisfactory, for the double reason that, as pointed out above, the trustee is not necessarily the legal owner of the trust property, and secondly that the reposal of a confidence, although a characteristic which many, perhaps most, trusts possess, is not an invariable characteristic; for it is quite clear that the author of the trust may himself be, and often is, the trustee (see Lewin on Trusts, 9th ed., 12), and it is meaningless to speak of a person reposing a confidence in himself.

[1] Elements of Law, § 617.
[2] See also Pollock on Contracts, 6th ed., 196; Anson on Contracts, 8th ed., 225.
[3] Anglo-Indian Codes, vol. i, 823.

Mr. Underhill[1], however, notes two distinctions of the kind sought. These are:—

(1) That a trust, no matter how created, can be enforced against the trustee apart altogether from any consideration being given him, while a contract, except when under seal, cannot as a rule be enforced against the promisor unless such consideration be shown.

(2) That a contract cannot be enforced by any one who is not a party to it[2], while it is one of the most conspicuous characteristics of a trust that it can always be enforced by the person for whose benefit it was declared or created, although he is generally no party to its creation.

The first, however, is not in itself sufficient for our purpose, for it is just that group of contracts which most resemble trusts, viz. bailments, which forms the exceptional class of simple contracts that can be enforced without proof of consideration. But in (2) bailments fall into line with all other contracts and differ from trusts, so that this seems to be a true point of distinction between every trust and every contract. If, then, the definition is so framed as to cover it, it would seem to sufficiently differentiate trust from contract.

Having settled the dividing line between trusts and contracts, the other characteristics exhibited by the former may be summarized thus:—

First. The word trust in common speech no doubt imports confidence, and at first sight it might be thought that the legal description of a trust should necessarily have reference to this fact; but it has already been shown that however it may have been formerly, the notion of confidence is not now essential to what lawyers mean by a trust[3]. For trust also connotes obligation, and an obligation which though at one time merely moral has long since become legal. When the obligation was merely moral it was natural that the notion of confidence involved in a trust should be uppermost in men's minds, and it is not surprising to find that the old writers generally made it the pivot of their ideas (conf. the older definitions set out above), but now that all trusts have for so long been enforced by the courts the notion of confidence has fallen into the background, and that of obligation has come into prominence in its stead (conf. the later definitions set out above)[4].

Secondly. The obligation is one which may be expressly imposed by act of the party, as in the case of express or declared trusts, or

[1] Trusts and Trustees, 4th ed., 5.
[2] *Price* v. *Easton*, 4 B. & Ad. 433; *Tweddle* v. *Atkinson*, 1 B. & S. 393.
[3] Lewin on Trusts, 9th ed., 7, 12.
[4] See also per Lindley L.J. in *In re Williams*, '97, 2 Ch. 12.

which may be imposed by operation of law as in implied or constructive trusts.

Thirdly. The obligations to which trusts give rise can only exist in connexion with property. 'An obligation to do or forbear some act not relating to property is not a trust, whatever else it may be[1].' Property is here used as meaning the subject of a right of ownership, for as has already been said, it is not essential that the trustee should have the legal estate or ownership so long as he has the control of the trust property.

Fourthly. The obligation involves a separation between the complete control of the property to which it is annexed and the complete beneficial interest therein, although the obligor may himself be the party imposing the obligation and is not necessarily excluded from being beneficially interested under it.

Lastly. The obligation is of equitable origin, i. e. in former times was not universally enforceable in Courts of Justice, but only in those known as Courts of Equity. This feature, however, has become merely historical since the fusion of Law and Equity effected by the Judicature Acts.

Since then the first and last of these cannot at the present time be said to be distinguishing marks of a trust, they should be disregarded. We thus reduce the fundamental facts which the definition ought to express to the following:—

(1) An obligation which may be imposed expressly or by implication of law.

(2) The restriction of the obligation to the dealing with property over which the obligor has control.

(3) The separation between the control of the property and the entirety of the beneficial interest in it, subject to the obligor being one of the persons entitled.

(4) The capacity of any one of the persons beneficially interested to enforce the obligation; which may be combined to form a definition as follows:—

'A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation.'

This definition seems not to be open to any of the criticisms urged against the series set out above. It is not straining language

[1] Underhill, Trusts and Trustees, 4th ed., 6; Godefroi, Trusts and Trustees, 2nd ed., 7; *In re Barney*, '92, 2 Ch. 265; and see the *Buckhurst Peerage*, 2 App. Cas. 1; *In re Brooke & Fremlin's Contract*, '98, 1 Ch. at p. 651.

to speak of a person imposing an obligation on himself, while it is submitted that the use of the words 'any one of whom may enforce the obligation,' sufficiently marks the distinction between trust and contract; even if the definition is still wide enough to include a depositum bailment such as that in *In re Tidd*[1], that particular kind of bailment is so like a trust that it is really unobjectionable to call it one. On the other hand, it may perhaps be objected that it is not wide enough to cover trusts in which there is no cestui que trust, like a trust for the erection of a monument such as that in *Mitford* v. *Reynolds*[2], or for the care of animals as in *In re Dean*[3]; it is true that these have been decided to be valid trusts, although they are not enforceable by anybody. In conflict with this decision however, it has been said to be elementary law that, for the creation of a trust, there are three requisites—a trustee, a cestui que trust, and property which one man holds on trust for another[4]. Such trusts are therefore not trusts in the ordinary sense in which the term is used by lawyers; they may perhaps be called trusts of imperfect obligation.

WALTER G. HART.

[1] '93, 3 Ch. 154. [2] 16 Sim. 105. [3] 41 Ch. D. 552.
[4] *In re Brooke & Fremlin's Contract*, '98, 1 Ch. at p. 651.

THE ANCIENT JUS GENTIUM OF THE ARYANS.

THE closer study of the laws, customs, and literature of the ancient Hindus has contributed in no small degree to cast a side-light upon many interesting questions touching institutions whose origin was more or less involved in obscurity. Even those who admitted that the people of Northern and Southern Europe were ethnologically descended from the same stock as those who in a remote past wandered from the plateaus of Central Asia into the plains of India, and produced the Vedas, were not prepared to seek for or to discover a common parentage for usages and institutions which later inquiries have shown were as common to those who dwelt on the banks of the Indus, the Jumna, or the Ganges, as to those who inhabited the Graeco-Italian settlements of Crete, Athens, or Rome. That any connexion could exist between usages of peoples so widely separated in point of locality, culture, and physical conditions, between whom no intercourse had certainly taken place for centuries, and whose common descent from a prehistoric race was relegated to a past of which nothing was clearly known, was, it must be admitted, in the highest degree improbable. But truth is said to be stranger than fiction, and we are not unaccustomed in modern times to find analogies where one least expects to meet them, and to correct our older faiths and beliefs with reference to the irresistible evidence supplied by more recent investigations and researches. Indeed the experience of every day, and in every department of knowledge, teaches us to recognize the immortal truth which an immortal Shakespeare conveys to us in the well-known lines—

> 'There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy.'

And thus as Science which laughs to-day at Hypnotism and Telepathy may to-morrow have to yield to the force of accumulative evidence in support of such phenomena, so the legal scientist must be prepared to have his early notions of the genesis of juristical concepts modified as the study of comparative jurisprudence widens its sphere and enters more freely into the curriculum of a lawyer's education. That science as yet in its infancy, at least in England, and but recently emerged *vix aut ne vix quidem*, as an independent branch of study from the chill neglect of the

past, has already in Germany, under the influence of the historical school of jurists, made rapid strides[1]. It has given to the study of the Law a fascination which no library of musty Case Law, however well stocked with the judicial wisdom of ermined judges, could evoke. It has diverted attention more to principles than precedents; it has taught us to weigh the value of the latter by a closer application of the former, and not vice versa; and it has pointed out that an historical development underlies all legal concepts, which can alone satisfactorily explain their meaning. What comparative philology or linguistic science has done for the study of language, comparative or ethnological jurisprudence has paved the way for accomplishing for the more enlightened study of law. As the former science has taught us to look to a common primitive Arian language as the fundamental source of the Indo-Germanic tongues, so the latter has widened the vista of our knowledge by embracing within the range of our inquiries not merely the early beginnings of our own laws, but the points of resemblance which those laws bear to the laws of other nations, to those, for instance, of the Graeco-Italian, Germanic, Slavic, and Celtic races, and these again to the still earlier laws of Iranian and Indo-Aryan peoples. This enlarged comparative-ethnological method of inquiry has already produced results of which the jurisprudence of, say, fifty years ago had no conception. It has led to the discovery of far-reaching parallels in the legal life of the different peoples of the earth which cannot be explained as mere accidental coincidences. Nor is the cumulative force of these interesting coincidences in the least affected by the occasional shades of difference which peculiar conditions of existence of particular races have naturally produced. If the latter mark on the one hand the individuality of national or racial character, they serve at the same time to emphasize the more marked coincidences as emanations or outcomes of a common human nature, which supplied the Roman jurist with that famous principle of *naturalis ratio*, upon which he based the authority of the *jus gentium*, that body of law which was applied in the Roman system of administration to determine all disputes between Romans and foreigners, or between foreigners *inter se*, and which was recognized as of universal application because *apud omnes* (*populos*) *peraeque custoditur*. It was distinguished alike from the *jus naturale*, which nature taught to *all* animals alike, and from the *jus civile*, which was the law peculiar to a given state, and preeminently that which governed the relations between Roman citizens *inter se*.

[1] See the interesting volumes by Dr. Albert Hermann Post, entitled, Grundriss der ethnologischen Jurisprudenz, Oldenburg und Leipzig, 1894.

This allusion to the *jus gentium* of classical Roman Jurisprudence suggests some interesting questions which it is the object of this paper to consider from a point of view which, in this country, does not appear to have been previously examined with the attention and research it has received in Germany, and especially at the hands of Dr. B. W. Leist of the University of Jena. The introduction of a system of universal jurisprudence in a country so wedded to its own national or civil law as Rome, and widely differing from the framework or *technique* of that law, was certainly a remarkable concession to that practical *weltgeist* or *weltsinn* which influenced Rome in all her external dealings. But if the introduction of such a system as the *jus gentium* marked a new epoch in the history of Roman Jurisprudence, which revolutionized the administration of the law peculiar to Rome, it is particularly interesting to the student of history as affording one more example of the truth of the principle that new ideas only establish their empire at the expense and upon the ruins of other ideas which they replace. From the period that a *jus gentium* began to be administered by Roman magistrates the stricter *jus civile* of the Roman citizen commenced to experience innovations which gradually changed its whole character, and moulded it to the requirements of a more progressive age. But if the triumph of the *jus gentium* was gained at the expense of the *jus civile*, we may be well assured that in like manner the *jus civile* had itself been gradually established at an earlier period as the distinctive law of Rome on the ruins of a still earlier system which it succeeded in supplanting. Is it possible, then, to go behind this intermediate stage in the evolution of legal ideas, and uplifting the veil which conceals a more remote antiquity to discover the system which preceded it? Was this system too a purely national one, peculiar to a particular people, or was it rather a system which corresponded with the natural workings of the uneducated human mind? Was it religious or temporal in character, or with a tendency to an intimate fusion of both elements? In what direction are we to look for the true solution of these interesting questions? and finally, is the principle which underlies the whole theory of the *jus gentium* any other than the principle which runs through the *dharma* of the Hindus, the *physis* of the Greeks, and the *fas* of the Romans? In short, may we not look for the true explanation of the *jus gentium* in those earliest systems of law which prevailed amongst the ancestors of the three leading nations of antiquity who could boast of an Aryan descent?

These questions can obviously only be touched upon in a very summary manner within the limits naturally prescribed for a

magazine article. I shall therefore attempt no more than to indicate the lines of possible inquiry, leaving it to younger and fresher intellects to pursue the subject with the knowledge requisite for its proper elucidation.

But before proceeding further it is necessary to understand clearly what the Romans meant to express by the term *jus gentium*. In a modern and popular sense the term is usually interpreted to mean a *jus inter gentes*, or *droit des gens*. But in the Roman system it had not the signification of an international law, that is to say of a law governing the relations between independent States, but rather, as explained by Gaius in the passage already quoted, of a *jus, quod apud omnes (populos) peraeque custoditur*, the principles of which commanded the general consent of nations which had intercourse with the Romans, and which were therefore rightly appealed to in all private disputes in which foreign citizens were concerned either as plaintiffs or defendants. In either view it will be seen the *jus gentium* represents a set of principles governing worldly transactions, which were at first supposed to be derived from the dictates of a nature common to man and beasts, at a later period from the teachings of human nature alone, and in its final period, according to its popular meaning, from the political agreements (express or implied) between States themselves. But both these views presuppose the existence of independent communities, *qui legibus et moribus reguntur*, and can only therefore refer to an advanced stage in the development of legal institutions. If we desire, however, to discover the origin of an institution which is said to be based on the teachings of human nature, we must push our inquiries a good deal further back in the past than at the commencement of a period when nature had begun to be controlled by the laws and customs of her human creatures. Popular tradition may generally be trusted for preserving an earlier recollection of an existing institution, and the Roman jurist no doubt voiced this tradition of his time when he based the *jus gentium* on a *naturalis ratio*, the untutored prompting of the human intellect as yet unacquainted with the institutions, the laws or customs of an organized civil society. Even in his day it was an unwritten law, a *jus non scriptum*, in the formation of which we may well assume there was an assimilation of ancient customs, which survived in the popular tradition, but of which no written memorials existed.

Now since the State has undoubtedly grown out of the City, and the City out of the Family, so the law of the Family must have gradually expanded into the law of the City, and the law of the City must in like manner have furnished the elements which eventually

developed into the law of the State. The only satisfactory way therefore of tracing the history of a particular institution must be by working backwards through the same course of development which the constitution and law of each State have themselves undergone. We shall thus eventually arrive at the Family as the fundamental source of all our later developments, the type upon which cities, republics and kingships have been constructed, the midget miniature, as it were, from which the larger organizations have been expanded, but in which its own imperishable likeness is still faithfully mirrored. In the Family itself, the central point of view to which we must in all cases turn is the Domestic Hearth (*Hestia*) or Household (οἰκία), the seat of its activity, the home of its members, and the sacred shrine of its protecting deities. It is then in this primitive Household, in this miniature of the City and State, in the laws or customs or usages—call them by what name one may—which regulated the relations *inter se* between the different members which constituted each Household under the supremacy of its head, that we must seek for the genuine source of that *jus non scriptum* to which the Romans gave the name of *jus gentium*, and which derived all its force and authority from the *naturalis ratio* which permeated, or was supposed to permeate, through all its leading precepts.

The characteristic feature of this primitive Household, common to the Hindus, the Greeks and Romans, was that it was regarded as a community (κοινωνία) composed of a House-father (οἰκονόμος or δεσπότης), a House-mother (δέσποινα), of sons and slaves. It was presided over by the House-father, and it was this individual who was the special subject of Rights and Duties. All the other members were regarded by him as 'his own' (SVAM, MEUM, ἐπὶ σοῖσι καθήμενος), as his 'tools,' not indeed in the sense of being in his absolute ownership, at least in the earliest period of the Vedic age, but as his dependants or subjects whom it was his duty to govern as a king or lord. The Household or κοινωνία represented the unity of the Aryan family in its religious, moral, and material aspects. In its religious aspect it was an *aquae et ignis communio*, whose seat or dwelling was to be chosen in a place abounding in wood and water, both of which were requisite for the due performance of the prescribed religious ceremonies, and which involved the constant maintenance of the Hearth or Hestia fire, and the performance of sacrificial duties. Its moral elements included the sanctification of the threshold, and the avoidance of all impurity from entering within its sacred precincts; the fulfilment of all duties connected with the Household and prescribed by the *Dharma*; and the distribution of alms to the poor and needy. Thus Vasishta

expressly says [1], that although the householder may have performed his prescribed duties, sacrifices and the Vedas bring no blessing to him '*who is deficient in good conduct.*' His standard of 'good conduct' was to be the practice of 'wise men': what they practise, said Apastamba, 'is virtue, what they blame is sin.' In the practice then of these 'wise men,' he was to seek his moral guide, for neither gods, *Gandharvas* or *Manes*, went about proclaiming '*this* is virtue, *that* is sin.' But 'wise men' are themselves guided by what a sound and healthy reason instructs them, and thus the ultimate rule of conduct is that *naturalis ratio* which we have seen was the fundamental basis of the *jus gentium* of the Roman jurists. And from a materialistic point of view the Household was an organization which effectually provided for the bodily sustenance of all the members which composed it, by declaring the duty of supplying them with food, as one inseparable from the position of the Housefather, who was said to commit a grievous sin if he partook of food before the rest of the household had received their share. To discharge this duty he is bidden to acquire wealth, which he must use for the common welfare, and he is warned that he has three great enemies to guard against, the lust of the flesh, anger, and envy.

It will thus be seen that amongst the ancient Aryans the Family system included all those three elements which have in all times and amongst all the leading races of mankind constituted the three fundamental sources of all laws, public or private, embracing the religious, moral and material interests of man. All these elements were centred around and kindled by the domestic fire, and in the perpetual maintenance of the household *sacra*, which was alike incumbent upon the ancient Hindus, Greeks, and Romans, we see a survival of the period when these races were still united by a common cult, and which in after centuries, when each of them had established empire in different parts of the globe, was still cherished and rigorously enjoined. For the solemn and imperative words of the Roman law, *ritus familiae patrumque servanto; sacra privata perpetuo manento*, merely embodied the oft-repeated injunctions of the ancient Vedas, to disobey which was to incur the penalty of dying childless and to become an outcast. And so the Greek householder was at first called ἐφέστιος, one having a hearth or home, and the household gods θεοὶ ἐφέστιοι, while he who had no hearth was ἀνέστιος and was likewise ἀθέμιστος, outside the pale of the law (θέμις).

The term which was applied to the rules which governed this social system was in Sanskrit *ṛita*, which we find literally adopted in the Roman *ritus* of the Twelve Tables, a term by

[1] vi. 4.

which the best Roman writers of a later period, such as Cicero and Livy, still designate a religious usage or ceremony. This ritual law, based upon a *naturalis ratio* and conveying the same general notion as the Greek φύσις, was a part of the *dharma*, a body of precepts constituting the *jus divinum*, which in scope and authority corresponded with the θέμις of the Greeks and the *fas* of the Romans, and which historically may be placed between the *ṛita* or *ritus*, preeminently ritual, and the later *jus humanum*, or law proceeding from a purely human source. We know, in fact, that the Roman *ritus* was largely affected by the introduction of the Sibylline books, imported from the cities of Asia Minor, which completely altered the ancient Roman cultus. Originally foreign deities were excluded from the narrow circle of State Gods, whose worship was jealously guarded by patrician priests. But under the influence of the Sibylline books Graeco-Asiatic gods were now introduced into the Roman cult, and religious sacrifices were performed partly *Romano ritu* and partly *Graeco ritu* (Marquardt's Römische Staatsverwaltung, iii. p. 44).

If again we examine the composition of the rules sanctioned by the ṚITA (*Gṛihya Sutras*) and DHARMA (*Dharma Sutras*), we shall find, speaking broadly, that they embrace four religious and five moral duties, which in their scope and operation bear distinct resemblance to those recognized by the φύσις and θέμις of the Greeks, and the *ritus* and *fas* of the Romans. They prescribe obedience to the gods and parents; honour to be paid to the dead, to the guest, to the beggar, and to the suppliant; they forbid murder, theft, and falsehood; and they insist on purity of life and restraint of the passions. They recognize also the duty of the House-father to provide for the members of the household, and impliedly, if not expressly, for the proper discharge of this duty, they contemplate the acquisition of property, and the possession of cattle and slaves.

In these provisions of the early Aryan *jus divinum* which were common to every household, we have a nucleus of precepts which were easily capable of indefinite extension by a simple application of the golden rule of *naturalis ratio*. Thus by the admission of slaves within the household, we arrive at the introduction of the first elements of ownership, for they, together with the cattle and other inanimate objects, constituted the κτῆμα of the Greeks and the *bhuktam* of the Hindus, and so down to the period of Gaius *quodcunque per servum acquiritur, id domino acquiri*. Indeed, in the first glimpse we get of the Indian Aryans, as described in the Vedic hymns, they appear as already well-organized in tribes, and seem to have attained a degree of social development which is far removed from primitive simplicity. Trade was carried on by a system of

barter; gold pieces are mentioned, and even the usurer, who has always flourished on Indian soil. We may well believe that in course of time as households intermarried with other households and settled in villages, and these villages grew into cities, the organization of the primitive household furnished the type for the constitution of the larger community. The *grihin* or οἰκονόμος becomes the *raja* or *basileus* or *archon* of the city, whose claim to obedience and honour rests on the *ṛita* and *dharma* of the ancient *Sutras* and the *physis* of the Greeks. But while amongst the Hindus a strong conservatism kept them wedded to their ancient institutions and customs, so that they have never strictly outlived the regulations of the primitive *dharma*, the Graeco-Italian races underwent a very different course of development, and became in the onward march of centuries as radically different from their primitive ancestors before they emigrated either (according to one theory) westward towards Europe, from the high table-lands of Central Asia, or (according to another theory) from North Europe eastwards, as they differed from each other in language, physique, habits, and customs. Pride of nationality encouraged and emphasized differences of this kind, and led to the slow but steady development of distinctive national laws which regulated the rights and duties of the citizens of particular States. Thus arose those systems of laws which claimed an exclusive dominion over all persons who enjoyed the rights of citizenship under them, and to which the Romans gave the distinctive name of the *jus civile*, or the *jus proprium civium Romanorum*. Naturally these special laws were framed with reference to the peculiar conditions of life and the requirements of the particular people for whom they were intended. But even in Cicero's day there was a longing for a broader system of equity, or to use his own language, for a more solid and express image (*solidam et expressam effigiem*) of true right and its sister justice, than the shade and faint resemblance (*umbra et imaginibus*) of the same presented in the strict civil law (Off. iii. 17). It was the first movement towards that denationalization of the private law which was largely to be realized under the Empire, when the principle contended for by the great orator would be more and more acknowledged in practice, 'that whatever is the law of nations, the same ought to be civil law' (*quod autem gentium idem civile esse debet*). So that notwithstanding the national and distinctive character of the strict *jus civile*, the influence of the earlier *fas* is gradually reasserted, as we may trace, for instance, in the tender regard shown to the *naturalis obligatio*, which according to the prevailing view of German jurists, supported by the great authority of Savigny and Puchta, can only be explained with reference to

the obligations of the *jus gentium* of the ancients. A text of Paulus, in which he says, *In natura debet, quem jure gentium dare oportet, cujus fidem secuti sumus* (Dig. 50, 17, 84 § 1), seems to give some support to this view, which is, however, contested by Schwanert, and more recently by Professor Dernburg. The weak point, of course, in the prevailing view lies in the fact that the pure *naturalis obligatio* was never actionable under the *jus civile*, while other *naturales obligationes* traceable also to the *jus gentium*, such as *mutuum*, *emtio venditio*, and the like, were not denied an actionable character. But in this distinction, arbitrary as it may appear, we have a peculiarity of the *jus civile*. Its original formalistic strictness so far yielded to the progress of the times, and the trend of public opinion as to concede a legal recognition to certain transactions of daily occurrence freed from any formal declaration of the will, which, under the strict law was the *causa*, or, more correctly speaking, the *proxima causa obligationis* which gave them their actionable character. But it was only by a process of gradual development of juristical ideas that even the so-called 'real-contracts' received a judicial recognition. A further progressive step was reached when certain other transactions which the moral sense of the public or commercial credit openly approved, but which the State had hitherto refused to recognize in any way, were accorded an imperfect recognition. These transactions were henceforth regarded as producing *naturales obligationes*, which only differed from *obligationes civiles* in the one circumstance that they were not *directly* actionable. They could be made the ground of an equitable defence, and could also support a novation or a promise of payment. Originally they were not even included in the term *naturales obligationes*, which was restricted to those obligations derived, it is true, from the *jus gentium*, but to which the civil law extended a right of action. It was only under the later developments of imperial progress that the term was also held to embrace all transactions which created *debita* in the sense of excluding a *condictio indebiti*. And even when this extension and partial recognition by the *jus civile* was permitted, there still remained a large group of conceivable cases in which upon moral grounds arising from personal relations connected with the duties of the family, tutelage or *hospitium*, a certain 'indebtedness' (*schuldigkeit*) was conceded *pietatis causa*, to which nevertheless the term *obligatio* was never applied (see Brinz, Pandekten, § 219, p. 42, and § 222, p. 52, bd. ii). It cannot, therefore, be safely argued that the pure *naturalis obligatio*, to which the Roman law ascribed no actionability, is not upon this ground to be referred to the ancient *jus gentium*. As we have seen, it was only by slow degrees and for special reasons that the *jus civile* invested

some of the obligations of the *jus gentium* with a direct action. It was an exceptional treatment from which a general argument cannot be rightly deduced. But it is perfectly legitimate, on the other hand, for our purpose, to point to this gradual recognition of *naturales obligationes* in so strict and exclusive a system as the *jus civile* of the Roman citizen, as furnishing important evidence of the abiding influence of that principle of *naturalis ratio* which was the foundation, as we have seen, of the precepts of the *dharma*, the *themis* and the *fas* of the ancient Hindus and of the Graeco-Italian races.

And if this influence was felt in modifying the strictness of a particular national law, we may reasonably expect to find it attaining a still wider recognition in a sphere where the application of the national law was even more obviously inappropriate. The Romans were essentially a people who loved justice, and as their empire widened and the great mother-city of the world opened her gates to people from every part of the globe, it seemed to them opposed to natural justice to apply their own law to the adjudication of disputes between persons who were aliens in the sight of the law, who were ignorant of its provisions, and could not be presumed to have entered into engagements with reference to them. It was one thing to enforce that law against those who enjoyed the rights of citizenship under it, who had grown up under its influence, were acquainted, or might be presumed to be, with its technicalities, and were proud of its national character. But in the case of foreigners, who might perhaps be only temporarily present in the capital, each of whom probably had his own national law, the application of an alien law was not in harmony with the liberal spirit of Roman administration. On the other hand, if the *jus civile* was inappropriate that of a foreign plaintiff or defendant was equally so, for it might happen that the opposite party belonged to a different nationality, and each would then have as much right to the benefit of his own law as the other. Under these circumstances the Roman jurists devised the system to which they gave the name of *jus gentium*, the leading principle of which was the *naturalis ratio*, which was believed would command the approval of all people, and which, as we have seen, was the fundamental basis of the ancient unwritten law. History thus repeated itself, and diversity began once more to yield to unity. The *jus gentium* thus became the *jus commune*, peculiar to no people but common to all, and under the influence of two leading forces, that of Hellenism and Romanism, which had for centuries familiarized neighbouring nations with the principles of administration of these two great systems, there was probably found to be more uniformity existing in actual practice than was to be expected upon purely theoretical grounds.

Indeed it has been truly said that there is very little of the old Roman law that cannot be matched by similar provisions in the laws of other countries, and the reason for this must be plain to any one who has closely studied the history of the *jus civile*. For its earliest source, the law of the Twelve Tables, was itself a body of principles in the framing of which the compilers owed not a little to the Athenian and other foreign laws which came under their observation, even if we reject with Vico and his school of critics the story of the mission to Greece in 454 B. C. of the Triumvirs who were commissioned to frame the first written law of Rome. We have, at all events, very good grounds for thinking that the compilers had such foreign laws before them, and it is equally certain that the customary law prevailing at the time was largely incorporated by them into the Tables which they compiled, precisely as we find was the case in the compilation of the Laws of *Manu* by the Indian Brahmins. Then again, from the period of the institution of the *praetor peregrinus* onwards we have a double system of Jurisprudence, partly based on the strict national law and partly on a cosmopolitan law, with an ever increasing tendency on the part of the latter to override the former, which obtains its most complete expression under the reorganization of the constitution under the reforms of Diocletian and Constantine. So that Hölder is not far afield when he contends that the *jus gentium* as administered by Roman Courts was as much a positive Roman law as the *jus civile* itself. For the period preceding the compilation of the Twelve Tables, the only law which prevailed was that which was under the special protection of the Roman priesthood, which represented the rule of God and of reason, and which derived its force and authority from tradition and custom. And since this tradition and custom formed the basis also of the law of the Twelve Tables, with an admixture of principles borrowed from Athenian laws, which were again but the generalized form of all that was best in Greek custom and habit, we may say that from the earliest period Roman Jurisprudence was distinctly favourable to a system of universal law, an unwritten κοινὸς νόμος, which was the expression of human reason, and to which Roman jurists gave the felicitous denomination of a *jus gentium*.

We do not possess any record of the contents of this composite law any more than we do of the English Common Law. But we may assume that it was animated throughout by that spirit of equity and justice which characterized both the law of the Praetor's Edict and the law administered in the Roman provinces by the Pro-Consuls or Governors. It was still a *jus non scriptum*, and in the final triumph of the principle which gave it vitality and which

served as the leading guide to the Courts which had to administer it, we are able to connect the present with the past, to link the matured equity of the Roman jurists with that earlier *jus non scriptum* which regulated the households of the ancient Hindus, Greeks and Romans, and through three periods of stress and storm and of internal development to trace it through its varying phases of a religious, moral, and civil institution, corresponding with the transition from the household to the city and from the city to the more complex State. As a river which flows from the mountains to the sea, increasing in its volume but ever carrying onward the limpid waters of its source, though mingled with those of other smaller or larger streams it may have met with in its course, is still the same river, so the *jus gentium* of the ancient Aryan and Graeco-Italian races passing down the stream of time grows doubtless in scope and magnitude, receiving contributions here and additions there, until it finally develops into the larger and more comprehensive *jus gentium* of the Romans of the classical age. But it is still the same sort of *jus*, animated by the same spirit and guided by the same principle—the principle that human nature is everywhere akin, and that the human mind, however it grows in culture, is still human, 'not to be changed by place or time,' and is governed by the same *naturalis ratio* which guides its action in every stage of its intellectual development.

To sum up the result of what has been said above, I would venture to assert, following humbly in the footsteps of Leist, that the key to the proper understanding of the Roman *jus gentium* is to be found in the rules which regulated the κοινωνία of the ancient Aryan household, in the *dharma*, *physis*, and *fas* of the three great representative races of that common stock which peopled India and Europe. At first a *jus divinum* instructing man in his earliest social development how he could best please the gods and secure his own happiness, later still under human but wise interpreters teaching him his moral as well as his religious duties, that is to say a mixed ritual and moral ordinance, and under a still far later development, covering a period of many centuries, expanding into a broad system of equity and justice, eliminating religion and avoiding technicalities, it becomes a great civil institution, and a monumental record of Rome's greatness and of her capacity for universal empire. But throughout these progressive stages of development there is the same underlying principle giving it vitality and freshness, and in the consecration of the *naturalis ratio*, which appealed to all men alike, whether Romans or foreigners, the Roman jurists preserved a spirit of continuity and placed the system on a foundation which made it imperishable. The κοινωνία of the

ancient Aryan household has thus become the κοινωνία or household of nations, and the law which regulated the former has become the type for the latter. That law, originally intended for the few (*gesetz für die Meinen*), has developed into a law for all (*gesetz für Alle*), and, as it were, in the words of Omar Khayyám, 'round the one in the centre still circles the other.'

W. H. Rattigan.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Goodeve's Modern Law of Personal Property. Third Edition. By JOHN HERBERT WILLIAMS and WILLIAM MORSE CROWDY. London: Sweet & Maxwell, Lim. 1899. 8vo. lvii and 466 pp. (18*s.*)

GOODEVE'S Modern Law of Personal Property has long been the recognized text-book on this subject most in vogue with the abler class of students, while it not only furnishes the practitioner with accurate and concise statements of the principles applicable to the points he may have to consider, but puts him on the track of the authorities by which they can be justified and supported.

Having regard to the wide range of subjects which must necessarily be dealt with in such a work, it is no small credit to Mr. Williams and Mr. Crowdy, the editors of the third and present edition, that they have exercised a severe repression without affecting the value of the book as primarily intended for students. Indeed the present edition is rather shorter than the last.

The work has not only been carefully revised but has been in some parts rewritten, as for instance in the chapters on the Sale of Goods, in which the codification of the law by the Sale of Goods Act, 1893, has necessitated considerable alterations and additions, and in the chapter on Ships where a certain amount of new matter has been added as a result of the Merchant Shipping Act, 1894. The arrangement of the chapters as regards their subject-matter is the same as in the last edition.

The growing importance of the question of Domicile has been recognized by its discussion in a portion of the text instead of its being relegated, as in the last edition, to a footnote; but perhaps we should rather attribute this and similar changes to the praiseworthy aim of the present editors to incorporate the whole of the subject-matter into the text, leaving the notes to consist mainly of mere references to the statutes and authorities. One observes with satisfaction that the majority of cases quoted are recent, several having been decided in the present year. The various statutes referring to company matters passed into law since the last edition, such as the Winding Up Act, 1893, and the Company Act, 1898, are discussed in the chapter on Companies.

The subject of Estate Duty created by the Finance Act, 1894, finds a place in the chapter on Devolution of Property on Death, and the Wills Act Amendment Act, 1852, is an addition to the appendix. The index would be improved and reference to it facilitated if the subdivisions of the main headings were arranged alphabetically and not in the order in which the subjects referred to occur in the text.

It remains to add that the present editors appear to have successfully accomplished the difficult task of keeping out of the book a good deal of extraneous matter which often clogs works on these subjects, while at the same time they have furnished in a most convenient form an accurate epitome of the whole law of Personal Property in its many and various branches. S. H. L.

A Treatise on the Law of Easements. By CHARLES JAMES GALE. Seventh Edition. By GEORGE CAVE. London: Sweet & Maxwell, Lim. 1899. La. 8vo. xxviii and 609 pp. (25*s.*)

MR. CAVE made himself responsible for the sixth edition of Gale on Easements, and the skill with which he then did his work amply justifies him in undertaking the present edition. In the eleven years that have elapsed no great changes have been made in the law of Easements, and though a fairly large number of cases have been decided, none of them seem to have necessitated much alteration in the text. The new cases seem to have been referred to in their appropriate places.

Mr. Cave still adheres to the system of distinguishing his work from that of the late Mr. Gale by enclosing the former in brackets. We wish he could overcome his modesty enough to drop this arrangement. The system, to borrow his own phrase, gives a somewhat tesselated appearance to the work. The advantage of being able to distinguish the original text from the editor's additions and alterations does not seem to us to be sufficient compensation for the unpleasantness of reading a tesselated work.

As in the edition of 1888, Mr. Cave has adopted the useful practice of giving the dates of cases, but they are not always correctly given. The date of *Aldred's* case is given at p. 295 rightly as 1611, but elsewhere as 1738.

We observe with interest that in several of the United States of America (among them being New York, Massachusetts, Maine, Maryland and Pennsylvania) the doctrine of the English law with regard to ancient lights does not prevail, and an easement of light cannot be acquired by prescription or implied grant. The view there taken is that no grant can be implied, because the difficulty of preventing the exercise of the right claimed is so great that its uninterrupted user cannot be regarded as of right, and so ought not to be referred to a grant. This is the principle which in *Webb* v. *Bird* (10 C. B. N. S. 268) our Courts have held applicable to a claim to a right of air otherwise than through a defined aperture. If the matter were *res integra* we are not at all sure that our Courts would not follow the American authorities. It seems a strong thing to presume that if *A* builds close to his own boundary, with a window overlooking *B*'s land, *B* must either obstruct *A*'s light or submit to *A*'s acquiring an easement. Why should he be compelled to erect on his land a building which he does not want? Yet this is his only way of protecting his own property, unless he can get an acknowledgment from *B*.

The American Courts in holding that the doctrine did not apply in America seem to have assumed that the doctrine was unknown in English law before the Declaration of Independence. In this they were much mistaken. Besides the dictum of Wray C. J. in *Aldred's* case (1611) referred to by our author, there is a reference to the doctrine in the Year Books as early as 1443. Markham (afterwards Judge), arguing in the King's Bench, says (Y. B. 22 Hen. VI. f. 15): 'If a man raises a house

which stops the light of my house . . . I shall have assize (of nuisance) against him.' The Court did not dissent, and this passage seems clearly to refer to an easement of light. But the real American reason was that the English law of ancient lights was not thought convenient.

In quoting from the Year Books Mr. Gale did not accurately distinguish between judges and counsel. It is a pity that Mr. Cave has not, with the accurate information now available in Foss's *Tabulae Curiales*, taken upon himself to correct these inaccuracies. In a case cited from 6 Edw. IV. f. 7, Young, Pigott and Littleton are all described as judges, and Choke as Chief Justice. In fact Pigott was never a judge, nor was Choke ever a Chief Justice, and Young and Littleton only became judges two years later. It is curious that the editor should pass these mistakes, as on the same page he properly corrects Blackstone for describing Brian as then a judge. At page 125 Hankford J. is spoken of as 'Hank.' An abbreviation such as this, though usual in the Year Books, needs not be adopted in writing modern English.

These, however, are the author's, not the editor's errors. So far as we have been able to test Mr. Cave's additions we have found them accurate and sufficient. The book has been brought well up to date without any increase in its bulk.

The Law relating to Solicitors of the Supreme Court of Judicature. With an Appendix of Precedents. By A. CORDERY. Third Edition. London: Stevens & Sons, Lim. 1899. 8vo. xlvii and 583 pp. (21*s.*)

WHEN reviewing last year Mr. Poley's then recently published new treatise on this subject we pointed out (see L. Q. R. xiv. 94) the salient differences between his work and Mr. Cordery's second edition of 1888. Mr. Cordery, evidently recognizing that another Richmond is in the field, has now brought his book thoroughly up to date in every respect. Thus, although the present volume was published in the middle of May last, the decision in *Re Beall*, '99, 1 Q. B. 688, reported in the May number of the Law Reports, though of course too late for incorporation in the text, is duly noted in the addenda, where even so recent a decision as *In re D.*, W. N. '99, 68 (May 10, 1899) is included.

The passing of the Solicitors' Act, 1888, just after the second edition appeared, and other changes, legislative and judicial, during the last ten years, have caused a total addition to the present edition of 130 pages; thirty of which are accounted for by an increase in the index—which has been much improved—from thirty-five to sixty-five pages. The new matter includes a chapter on 'Striking off the Roll'; and an Appendix of Precedents (eight forms), of Articles of Clerkship, Partnership, &c., now appears for the first time.

In dealing with the subject of unqualified practitioners the author might with advantage have added to his useful list of the cases on summary conviction, in note (b) on page 40, a reference to one of the most recent of such cases, *Incorporated Law Society* v. *Martin*, 35 Sol. Jour. 88 (December 6, 1890), in which the more important previous cases will be found collected and reviewed. See also ibid. 613.

An important topic, amplified by Mr. Cordery in this edition (pp. 28–29, 144), is the powers conferred upon London and country solicitors respectively by their certificates to practise. While there is no doubt that a London

solicitor need not take out a country certificate, what can be done in London under a country certificate is a more difficult question; and, as Mr. Cordery says, the state of actual authority on the subject is not altogether satisfactory. We took occasion when reviewing Mr. Poley's book (*supra*) to endeavour to summarize the existing law, so far as it has yet been determined. The point turns on the proper interpretation of the phrases 'act,' 'practise,' and 'carry on business,' within the meaning of the Solicitors' Act, 1870. It resolves itself in each case into a question of fact, to be determined, however, by considering a series of acts and not isolated transactions. It is exceedingly doubtful whether any isolated act, of whatever kind, could constitute 'practising' or 'carrying on business.' It is from the failure to apply the above test that we venture to think the Council of the Incorporated Law Society, in dealing with a recent case submitted to them, in which the matter was fully discussed, came to an erroneous conclusion. See correspondence on 'Practising in London' set forth in 42 Sol. Jour. 713 (August 13, 1898). The General Council of the Bar appear to entertain a different, and we think more correct, view upon the general question. Thus, to take a single illustration, while the former body are of opinion that a country solicitor should not instruct counsel on an appeal from the County Court, except through a London agent (p. 28), the latter body hold that counsel need not refuse a brief in London sent direct from a country solicitor (p. 144). The whole subject is so important, and gives rise to so many points in everyday practice, that an authoritative decision of the High Court or Court of Appeal, setting it at rest, is greatly to be desired in the interests of both branches of the legal profession, and especially of town and country practitioners who are solicitors. If and when the question be definitely raised for judicial determination, the principles governing it will probably be recognized to be akin to those on which the judgments proceeded in *The Apothecaries Company* v. *Jones*, '93, 1 Q. B. 89. For the proceedings in the County Court in that case, and the judgment of His Honour Judge Kenelm Digby, see 93 Law Times 413 (September 10, 1892).

With Cordery and Poley on the same shelf there should be little difficulty in ascertaining any point of law connected with solicitors, in their relations both with the profession and with the public.

Key and Elphinstone's Compendium of Precedents in Conveyancing. Sixth Edition. By Sir H. W. Elphinstone, W. H. Coltman, and Arthur Dickson. London: Sweet & Maxwell, Lim. 1899. 8vo. Vol. I, cii and 1024 pp.; Vol. II, c and 989 pp. (£3 10*s.*)

In this new edition of a valuable and useful work both the precedents and notes have been considerably revised and added to in order to bring them up to date with the latest statutes and decisions, and this has been done very successfully. The most important feature in the edition is, of course, the revision of the precedents and notes, with the view of indicating alterations necessitated by the Land Transfer Act, 1897. Many new and useful forms have been inserted in connexion with the Act, and, in particular, the precedents which have been added for executors dealing with land under it appear to us to be particularly good and likely to be of great use to the practitioner. The notes, also, on the Act are good throughout, and great care has evidently been expended in their preparation. A word

of praise is also due to the forms which have been added for the purposes of compound settlements to meet the decisions in *Re Ailesbury* v. *Iveagh*, '93, 2 Ch. 345, and *Re Tibbits*, '97, 2 Ch. 149, and the notes generally on the subject of settlements on p. 467 of Vol. I are excellent.

The Specific Performance of Contracts, an expansion of an article in the Encyclopaedia of the Laws of England. By WILLIAM DONALDSON RAWLINS, Q.C. London: Sweet & Maxwell, Lim.; Edinburgh: Wm. Green & Sons. 1899. Sm. 8vo. xvi and 200 pp. (5*s.* net.)

IT is not an easy thing to write a first-rate law book. In order to accomplish this task the author must have a great knowledge of law, he must have a logical mind, he must have a great capacity for taking pains, and he must be a good English scholar. Mr. Rawlins combines all these qualifications, and his work, not perhaps the worse for being concise or for not being overloaded with cases, is of a very high order of merit. In the first chapter, after defining what is meant by specific performance, the author, perhaps with patriotic pride, says, 'Specific performance appears to be a plant of distinctively English growth, and to flourish only where there is a juridical system in which the characteristic ideas and principles of English Courts of Equity have taken root. The prevalent Continental view with regard to the judicial enforcement of contracts may, it is believed, be expressed approximately in the words of the maxim *Nemo potest praecise cogi ad factum*.' Germany, however, should have been excepted from this comparison, as in that country specific performance or restitution is the rule, and damages are given only where specific relief is impracticable; in conformity with this principle the measure of damages, when payable, is the cost of restitution (see the Civil Code, §§ 249–251), contrary to the Common Law rule. In subsequent chapters the author points out that the remedy at Common Law for breach of contract, being in damages only, was inadequate in many cases for the purposes of justice: he then traces the origin and development of the equitable jurisdiction. He points out with great clearness the distinction which is often overlooked between actions for specific performance strictly so called, which relate to the specific performance of executory contracts, and certain actions in which the Court enforces the performance of an executed contract in specie by granting an injunction restraining one of the parties from contravening the terms of the contract. There is a wide difference between the remedies in actions of these classes. Where the action is of the former class for specific performance of an executory contract the Court can order the defendant to do something, but where the action is of the latter class, for the enforcement of an executed contract, it will we believe in all cases (prior to the alteration of the rule by the Court of Appeal in *Jackson* v. *Normanby Brick Co.*, '99, 1 Ch. 438) be found that the order takes the negative form 'The defendant shall not—.'

Perhaps the third chapter on 'The Extent and Limits of the Jurisdiction' is one of the best in the book; in it the author, after stating that there is a *primâ facie* case for the exercise of the jurisdiction whenever it appears that one of the parties to a contract binding in equity has committed a breach of it, and that no remedy or no complete remedy is available at Common Law to the party aggrieved, points out the cases in which the Court will, as a general rule, refuse the remedy, stating concisely the reasons on which the refusal is founded. The author states with great clearness a rule of equity, which, while it is well known to conveyancers, is perhaps not

made sufficiently prominent in the text-books, namely that where leaseholds are sold under an open contract it is the duty of the vendor to perform the lessee's covenants until completion or transfer of possession; for, although it is true that by the statutory rule applicable to such a case (Conv. Act, 1881, s. 3 [4]) production of the last receipt for rent is sufficient evidence of the due performance of the covenants unless the contrary appears, yet if the purchaser can make it appear that any of the covenants have not in fact been duly performed, that will, it is conceived, provided he has not clearly waived the objection, be a good defence to an action by the vendor for specific performance.

It is impossible within the limits of our space to give an adequate account of the contents of this little book. Suffice it to say that there is not one dull chapter out of the seventeen that the book contains, and that we have not come upon any blunder in law. The author thoroughly deserves the success which he will doubtless attain.

Modern Land Law. By EDWARD JENKS. Oxford: Clarendon Press; London and New York: Henry Frowde. Sm. 8vo. xlviii and 476 pp. (15*s.*)

THE class of readers for whom this book is intended consists 'of those students who either at the Universities or elsewhere have to get up their law without the attractions or distractions of professional surroundings.' We presume this class must not be taken to include students who have not the benefit of oral teaching, for Mr. Jenks's book presupposes a considerable knowledge of law. For example, at p. 49 he gives a list of persons who can exercise the powers conferred by the Settled Land Acts on a tenant for life. How is it possible for a student who is a mere beginner to understand the meaning of many of the terms employed, unless he receives some oral explanation of them? The work is otherwise of very unequal merit. Some parts are very good. We may mention for example the rules for the creation of remainders at p. 95, the discussion of executory trusts at p. 113, the rules of limitation in chap. xi, and the discussion of covenants running with the land, p. 325. But on the other hand we find an inaccuracy of diction irritating to those who are accustomed to the extreme accuracy of lawyers of the modern school, and capable of being dangerous to learners. Let us not be misunderstood. We are not aware of any treatise on law which does not contain some inaccuracies or even mistakes, but we consider that accuracy of language is of the utmost importance in a book intended for students. As examples, it is stated at p. 51 that 'If *A*, tenant in fee simple, devise the land to *B* for life and die intestate of the remainder,' &c. It is hardly necessary to point out that the interest that *A* retains is a reversion not a remainder. At p. 161, 'A seignory . . . may be appendant to a manor or may exist in gross.' A manor strictly so called cannot exist unless some freehold lands are held of the lord as of his manor; in other words, a seignory is not appendant to but is an essential part of the manor. At p. 214, 'The principles of tenure require that an inheritable estate shall, on failure of heirs capable of succeeding, return to the creator of the estate or his representatives. Before the passing of the Statute *Quia Emptores* this rule was merely an example of the doctrine of reversions applied to the particular case of a fee simple. But as the last-mentioned statute forbade the future creation of reversions on fees simple, the theory soon became established that the existing reversions upon fees simple were not estates or interests in

reversions, but merely seignories with possibilities of escheats.' The student who has mastered the author's explanation of 'reversion' at p. 94 will, we fear, be misled by this statement. At p. 277, 'Any dealings in land by a corporation must be effected through the agency of its common seal.' These words will lead the student to suppose that every vicar has a corporate seal. At p. 453, in the discussion of the devolution of land on the death of a person registered under the Land Transfer Acts as proprietor, the author says, 'Where the new proprietor takes in a fiduciary capacity the fact will be noticed on the register,' and he refers to the Land Transfer Rules, 1898, R. 128. This rule provides that where the new proprietor is the personal representative of the deceased proprietor he is to be registered with the addition of the words 'Executor (or administrator) of . . . deceased,' but does not authorize in any other case an entry on the register of a statement that the new proprietor is a trustee. At p. 454 the author says, 'Generally speaking, no one may search a particular title [registered under the Land Transfer Acts] without the leave of the registered proprietor. But the Charges register may be searched by any one, and an official certificate of the result procured.' A person reading this statement would think that the provisions as to searching a title and the Charges register are different, but this is not the case. The explanation of the Statute of Uses at p. 109 is wholly inadequate, as the author only discusses that part of the Statute which provides that the *cestuique use* is to be seised of the like estates in the land as he had in the use; he entirely omits the words which transfer a sufficiency of the estate of the grantee to uses to the *cestuique use*. This omission is the more inexcusable as the importance of the words omitted by our author is pointed out in Joshua Williams's and Goodeve's treaties, and Elphinstone's Introduction to Conveyancing.

Steer's Parish Law. Sixth Edition. By Walter Henry Macnamara. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1889. 8vo. xx and 711 pp. (£1.)

Nearly nine years have elapsed since the last edition of this work was published. That edition, like the present, was the work of Master Macnamara. Very extensive alterations have been necessitated by the passing of the Local Government Act, 1894, which fundamentally changed the whole system of parish government. The editor has carefully revised his work, and has given us a useful and accurate summary of the law relating to Parish Meetings and Parish Councils. Other parts of the subject, such as the law of the Ecclesiastical Parish and the Poor Law, have also been materially affected by recent legislation, and seem to have been brought up to date in every respect.

The subject of Parish Councils is so extensive that a really complete treatment can hardly be looked for in a work of this kind. Thus the chapters devoted to the Adoptive Acts are so short that they scarcely contain enough detail to be of practical use. This is inevitable unless the bulk of the book is unduly increased. Perhaps the most valuable part of Steer's Parish Law is that which deals with the ecclesiastical parish and its officers. Master Macnamara writes with special knowledge of the Benefices Act, 1898, being the registrar of the new court constituted under that Act. We know of no better book on the ecclesiastical parish, and we could almost wish that the book were confined to this part of the subject, and the civil parish treated of in a separate and more complete treatise.

We have tested the index, the added matter, and many of the references, and have found no inaccuracies worth mentioning. The new edition seems to be a thoroughly trustworthy compendium of the new parish law.

The Powers, Duties and Liabilities of Executive Officers. By A. W. Chaster. Fifth Edition. London: Stevens & Haynes. 1899. 8vo. xliv and 277 pp.

We are disappointed with the new edition of Mr. Chaster's well-known and valued work. The first edition was excellent, but since then it has been entirely re-written and re-arranged, and not, we venture to think, improved. There have been added references to a vast number of cases and statutes, and the book has become a confusing mass of detail rather than a clear exposition of principles. In the first edition the matter was conveniently arranged under the titles of the several kinds of executive officers. The powers and duties of sheriffs were found in one chapter, those of constables in another, and so forth. Now all this has been altered, and instead we have a fanciful division of the subject according as the powers and duties relate to matters where the king is a party, or to local jurisdictions. There are subdivisions into 'Warrants and Orders' and 'Inherent Powers.' The powers and duties in relation to warrants and orders are again divided into warrants and orders of superior courts at common law, and warrants and orders other than those of superior courts at common law.

Thus the duties of a sheriff or a constable are scattered over some half-dozen separate portions of the book. Even such a specific matter as power to arrest for indecent exposure is dealt with separately under '*The King a Party—Warrants and Orders* (arrest under warrant, 14 & 15 Vic. c. 100. s. 9)'; '*The King a Party—Inherent Powers* (arrest without warrant, 14 & 15 Vic. c. 100. s. 29)'; and '*Local Jurisdictions—Inherent Powers* (5 Geo. IV. c. 83).' The last is an offence punishable on summary conviction, hence it is put under local jurisdiction. We should have thought the King was as much a party to an arrest for offences punishable summarily as to an arrest for indictable offences. It is difficult to see in what sense courts of summary jurisdiction are 'local jurisdictions' whilst courts of quarter session deal with matters in which the 'King is a party.' This unfortunate system of arrangement seems to vitiate the whole work. Even if it is logically defensible, which we doubt, it is far from convenient—and the defect is only in part remedied by a full index.

Moreover, a large part of the book consists of a number of disjointed sentences to which it is difficult to attach a meaning. Take for instance p. 107—headed '*Local-England—Inherent powers.*' The page begins with a new paragraph, as follows:—

'Persons impounding animals not providing food and water. This does not apply to the pound keeper.

'Persons keeping slaughter-places to affix names.

'Neck hair to be cut before slaughter, to be killed within three days, and food and water meanwhile provided.

'Cattle for slaughter not to be employed.

'Description of cattle slaughtered to be entered in book.

'Conveying so as to cause unnecessary suffering.

'Persons playing with false dice may be arrested.'

By perusing the preceding pages we gather that this is a list of misdemeanours for which a constable may arrest without warrant in England.

But it is not easy to gather from such bald statements what the offences are. Is it a crime to cut neck hair before slaughter or not to do so? and who, or what, is to be killed, or not to be killed, within three days of what event?

Again it is said that 'The following persons may be arrested in the Metropolitan Police District: . . . Three or more persons betting. . . . Booths open in fairs between 11 p.m. and 6 a.m., the owners or managers thereof, or when such fair has been declared illegal.' These statements are obscure and inaccurate. Are any three persons betting anywhere in the Metropolis liable to arrest?

The section on Highway Surveyors needs careful revision. The author does not appear to realize the distinction between the powers of the District Council as surveyor of highways, and those of the surveyor appointed by a District Council, who is empowered to do all ministerial acts required by any Act of Parliament to be done by or to the District Council as surveyor of highways. And we can find no reference to the powers of the County Council as surveyor of highways in relation to main roads. The principle enunciated in *Hardaker* v. *Idle District Council* and *Penny* v. *Wimbledon Urban Council* is not made clear, and the latter case (reported last year in the Court below, though the decision in the C. A. could not have been included) is not even referred to.

Part IV is concise and complete. It reads thus: '*IV. Wales.* These laws are as in England.'

The preparation of the book must have involved a vast amount of research. It contains a great deal of information which would be useful if it were better arranged and expressed.

A Compendium of Modern Equity. By Andrew Thomson. London: Wm. Clowes & Sons, Lim. 1899. 8vo. cxxii and 692 pp. (30*s.*)

In this book the late Dr. Thomson (who died while it was going through the press) proposed to furnish to practitioners in the Chancery Division a labour-saving handbook of principles and practice for daily use. Notwithstanding the difficulty of succeeding in the accomplishment of such a task within the limits he allowed himself, it is not too much to say that there are few subjects with which equity lawyers have constantly to deal not treated to some extent in this small octavo volume of some six hundred pages. As was to be expected, some of those subjects occupy less space, and are dismissed with less comment and examination, than their importance would warrant, while others receive perhaps too extended consideration. But if the book is used as a ready work of reference, as one in which to hit upon a particular line of authority, or to supply the last reported decision on the matter in hand—and, after all, those are in practice the main functions of a text-book—it will be found that the searcher will not often be disappointed. He will be reminded, by reasonably clear statements of them, of the guiding principles of each head of equity, and will, without perusing many pages (for necessarily no subject takes up a great number), come upon the newest case relevant to his inquiry. So far as we have been able to test Dr. Thomson's statements of the law, we have found them accurately as well as tersely put. Of his industry and care it is enough to add that the labour of producing a book of this kind must have been extremely arduous. The preface states that it may be taken, as regards some of its chapters, as a second edition of the author's former work 'The

principles of Equity and the Equity Practice in the County Courts.' It is in fact much more than that, both in bulk and usefulness. Some portions, left unrevised, though in print, at the author's death, have since been revised by Mr. W. M. Crowdy, who has also brought the citation of cases down to the date of publication.

The Law of Partnership: Six lectures. . . . By ARTHUR UNDERHILL. London: Butterworth & Co. 1899. Sm. 8vo. xvi and 182 +18 (index) pp. (3*s.* 6*d.* net.)

THESE lectures are a good specimen of the occasional extra courses delivered under the auspices of the Council of Legal Education for the use of men of business at large rather than professional students. From the lay point of view, therefore, we feel moved to ask Mr. Underhill, as a man of business, where he heard of the publisher who 'agrees to pay an author one-third of the gross sales of his book.' We suppose this means a royalty of one-third on the publisher's actual receipts, i.e. the trade price of all copies sold (exclusive or not exclusive of bad debts, if any?). This would be approximately the same in result as a royalty of twopence in the shilling on the nominal or 'marked selling' retail price of a discount book: such a royalty is common enough in practice, and for various reasons more convenient than a royalty calculated on gross sales. We do not deny that agreements in the form given by Mr. Underhill may occur; we are pretty sure they are not common. But, as the object of the illustration is merely to show what is not partnership, this is a digression.

We must say we do not share Mr. Underhill's doubts whether the Partnership Act has not in some way modified the effect of *Cox* v. *Hickman*, though we concur with him in regretting that Parliamentary considerations made it necessary to preserve so much of the infelicitous 'Bovill's Act.' We believe that in one or two places the language of the present Act has been made ambiguous—or capable of seeming so in the hands of an ingenious advocate—by amendments in its passage through Parliament, intended to make it more intelligible to laymen. But Mr. Underhill hits the nail on the head when he points out that the facility of forming private limited companies is the reason why the Continental *Société en commandite* would now be superfluous here. The fact is that our law and practice, which thirty or thirty-five years ago were much behind commercial requirements, have jumped right over the *commandite* or 'limited partnership' stage, as the lighting of the city of Aosta has leapt within recent years from petroleum to electricity without any intermediate age of gas. Whether the 'one-man company' be a thing of pure light is a question on which the simile is not intended to commit us.

The section on framing partnership agreements does not exactly correspond to anything in the existing text-books, and ought to be found useful.

We quite agree with Mr. Underhill in following the doubts expressed (extra-judicially) by the Master of the Rolls, and also by others, as to the correctness of *Watteau* v. *Fenwick*, '93, 1 Q. B. 346 (see L. Q. R. ix. 111); but it should perhaps have been made more clear that the case was not itself a partnership case at all.

Mr. Underhill has not thought it necessary to tell the lay people that *Kendall* v. *Hamilton*, 4 A. C. 504, was a surprise to the profession; and we do not suppose they will complain of his silence on a point which may perhaps be now said to have only historical interest.

The suggestion that the marriage of a female partner, though it no longer works a dissolution of itself, might be held one of the circumstances which 'render it just and equitable that the partnership be dissolved' is amusing and ingenious; and possibly some judge may be found to pronounce it correct. We wish we could congratulate the printers as well as the author. But there is no such English word as 'incidently'; the sentence 'it seems regretable [*sic*] that the *powers* of the Act of 1890 did not affirm this broad general principle' contains a blunder which we cannot emend with certainty; and French and German words are more than once badly mauled.

Companies in France. By THOMAS BARCLAY. London: Sweet & Maxwell, Lim.; Edinburgh: Wm. Green & Sons. 1899. 8vo. x and 150 pp. (*7s. 6d.*)

THIS book treats of the law relating to British companies and securities in France and the formation of French companies. The author is an English barrister and is also as much a member of the French bar as it is possible for an Englishman to be, and is well qualified to give instruction on a subject which has lately been brought prominently before the public. The judgment of the Court of Cassation in the case of *La Construction Limited*, which was given on Dec. 22, 1896, shows the necessity for learning what is the French law on the subject of companies registered in England but intended to operate in France. The judgment is set out in one of the Appendices to Mr. Barclay's book, and he discusses the case at some length, pointing out that the propositions on which the judgment rests are as follows: '1. Companies constituted according to British law are not necessarily British companies. Their nationality depends on the place of their corporate office and upon their principal establishment. It depends also upon the corporate office being of an effective character. 2. A company constituted according to British law is not entitled to exercise its rights in France, if formed to escape the rules of public order prescribed by French law for the creation and working of companies.' Mr. Barclay is very decided in his opinion that these propositions are in direct contradiction of the terms of the Treaty of 1862. If the decision can be called 'law,' French law is constructed on very different principles from those which guide our House of Lords. A perusal of *Salomon* v. *Salomon & Co., Limited*, '97, A. C. 22, accurately translated into French, is recommended for the education of tribunals across the Channel. After his chapter on the 'Status of British Companies' in which the case of *La Construction Limited* is dealt with, the author gives a chapter on 'Insurance Companies,' the 'Negotiation of Foreign Securities,' 'Dividend Tax,' viz. the tax on joint-stock companies' dividends known as *Impôt sur le revenu*, 'Ordinary Joint Stock (Anonymous) Companies,' 'Liability of Promoters,' 'Lost or Stolen Securities,' and the 'Position of French Companies in Great Britain.' His Appendices contain the Convention of April, 1862, a number of French laws and regulations as to joint-stock companies, the negotiation of foreign securities in France, and stolen or lost 'bearer' securities. The chapter on Anonymous Companies contains a form of articles of association, with the lawyer-like and most necessary caution that 'any general form of articles of association must merely be treated as affording a framework for instructions to those who watch the progress of company practice, which is almost as full of pitfalls in France as it is in England.' Many of the provisions remind one of the clauses to be found in a well-known English precedent book. Mr. Barclay's book

carries out the intention of its author, as expressed in his preface—'to afford the information required by all who are ... directly or indirectly connected with companies and securities in France.' F. E.

Church Law. By Benjamin Whitehead, Barrister-at-law. Second Edition. London: Stevens & Sons, Lim. 1899. viii and 331 pp. (10*s.* 6*d.*)

This unpretending little work professes to be, and is, a 'concise Dictionary of Statutes, Canons, Regulations, and Decided Cases' affecting the Clergy and Laity, arranged under heads in alphabetical order of subjects. It is a sober and safe guide to ecclesiastical law in a portable and handy form, intended no doubt more for the ordinary layman than for the practising ecclesiastical lawyer. In our notice of the first edition we expressed the opinion that it ought to be in the hands of every clergyman; and we rejoice to think that the appearance of a second edition indicates that the public takes the same view.

The Conveyancing and Settled Land Acts, &c. By E. P. Wolstenholme, W. Brinton, and B. L. Cherry. Eighth Edition. London: Wm. Clowes & Sons, Lim. xlv and 530 pp. (21*s.*)

The four years which have elapsed since the seventh edition of this valuable book was issued have produced a considerable addition to the case-law with which it deals, but have added very little to the collection of Statutes contained in the volume, the text of which is only increased by some twenty additional pages. The table of cases has been improved by the insertion of references to the reports in which the cases are to be found.

This new edition contains Part I of the Land Transfer Act, but the Judicial Trustee Act, 1896, is only represented by a few casual references. The omission of that Act unfortunately leaves the series of recent Trustee Acts incomplete.

The recent cases reported down to Easter 1899 have been well worked into the notes; and those practising conveyancers who habitually refer to the book will probably continue to maintain the opinion that it approaches as nearly to the description of 'an indispensable book' as any book in a conveyancer's library.

A Treatise on the Law of the Contract of Pledge as governed by both the Common Law and the Civil Law. By Henry Denis. New Orleans: F. F. Hansell & Bro., Lim. 1898. La. 8vo. xxxi and 619 pp.

Mr. Henry Denis is a member of the New Orleans Bar, and Professor of Civil Law at the Tulane University of Louisiana. Louisiana is a State in which the Civil Law derived through the French Law is administered. It has the advantage of a Civil Code, which in many respects resembles the Code Napoleon. Of the Roman Law and its descendants, the modern French Law and the Civil Law as administered in his native state, Professor Denis appears to have, as one would expect, a large and profound knowledge. His knowledge of the Common Law seems to be derived mainly from the best American and English text-books, such as Benjamin on Sales, Chitty and Addison on Contract, and the several works of Judge

Story. Of original research in the English and American reports, his writing shows but little evidence—and he would probably lay no claim to anything more than a second-hand knowledge of our common law.

In the preface he states his object to be 'to arrive at a better knowledge and understanding of the law of pledge of the Common Law by comparing it with the law of pledge of the Civil Law, from which it descends.' The book is a study in comparative jurisprudence, not a text-book. As such it is distinctly interesting and suggestive. The author insists on keeping clear the distinction between pledges and mortgages of personalty. For confusing these he finds fault with text-book writers and even more emphatically with judges. He says that in the Common Law 'There is yet a great deal of confusion and of disagreement between the text writers and the decisions of the Courts. Some of these, being unbound by any rules prescribed by statutes, have departed widely from the original and even essential principles of the pledge proper, and have established a jurisprudence which it is sometimes difficult to reconcile with the definition of the pledge given by the commentators of the Common Law itself, from Judge Story down to those of the present day.'

Though some ambiguous terms have been used by American judges, we are not aware that any English judge or writer of repute has confused pledges with mortgages; and in recent times the stringency of our law as to Bills of Sale has rendered it very necessary to define clearly the distinction between these two classes of security. (See for instance *Ex parte Hubbard*, 17 Q. B. D. 690.) It is significant of the methods of the writer, methods we suppose that obtain in all countries governed by the Civil Law, as they obtained in Imperial Rome, to give more weight to the views of writers of text-books than to the decisions of the Courts. It is a method, perhaps, sound in itself, but which it is difficult for an English lawyer fully to appreciate. Throughout the work we find that whereas the text-book writers are relied on as authorities, the decisions of the Courts are rather used as illustrations or as a matter for comment.

In the Civil Law it appears that there is no such thing as a bill of sale or mortgage of personalty without delivery of possession, actual or constructive. Hence the law of pledges assumes much greater proportions than with us. Liens also are a branch of the same law. Pledges of choses in action, of bills of lading, of policies of insurance, and of margins all play an important part in commercial law, and the whole subject is one which, if it occupies but a small space in English Law, is of the utmost importance in the Civil Law as administered in a commercial State like Louisiana.

As a thoughtful and philosophic treatise on an interesting branch of comparative jurisprudence we can heartily commend Professor Denis's work.

Le Mariage, le Divorce et la Séparation de Corps dans les principaux pays civilisés. By Ernest Lehr. Paris: L. Larose. 1899. 8vo. ix and 472 pp. (10 frs.)

Mr. Lehr has done excellent service in adding to the many books he has already published on matters of comparative law one on marriage, divorce and separation as practised in all the leading European countries. He divides his book into three parts: first, the laws of France, Algeria, and her colonies; second, of all the leading European countries; and third, a survey of the laws of these countries. The last division is a particularly valuable contribution to Comparative Law. Mr. Lehr in it shows what all European

peoples consider essential to marriage, and the precise nature of the divergences between them. In the same way he examines the points of resemblance and dissemblance between the laws of nullity, divorce and separation in different countries. The points of dissemblance as regards the laws of divorce he sums up as follows:

'The following countries recognize divorce only: Denmark, British India, Japan, Montenegro, Mussulman countries, Norway, Roumania, Russia, Servia and Switzerland.

'The following countries only recognize *séparation de corps*: Argentine Republic, Brazil, Canada, Chili, Spain, Italy, Malta, Mexico, Monaco, Peru, Portugal, Poland, Uruguay.

'Other countries of Europe and America allow concurrently divorce and *séparation de corps*, either for life or temporarily.

'Looking at the subject more closely, each of these great groups may be subdivided according to whether divorce and separation are allowed on determinate grounds only or also by mutual consent.

'Divorce alone exists, and on determinate grounds only, in Slavonic countries and Switzerland. Divorce by mutual consent is allowed alongside divorce on determinate grounds in Denmark, Norway, Japan and Prussia.

'*Séparation de corps*, alone recognized by the law, may be applied for by mutual consent in Brazil, Italy, Mexico, and Poland. In the other countries of this group divorce can only be applied for on determinate grounds.

'In countries which admit concurrently divorce and *séparation de corps*, the one kind, like Belgium, allow applications grounded on mutual consent; others like England, France and Germany, forbid these and make decrees of divorce or separation dependent on the presence of one of the grounds provided by law. Holland admits divorce on determinate grounds but authorizes separation by mutual consent.'

As regards England the extra-judicial but recognized practice as to separation deeds appears to have escaped the learned author's notice. The usual provisions in this behalf really amount to separation by mutual consent, though the law encourages reconciliation.

There is the same divergency as regards the different admissible grounds of divorce.

On the Continent there has long been a vague idea among marriage law reformers that the law of marriage might be made uniform throughout Europe. Mr. Lehr very justly observes that this object, however desirable, is far from realization, and his book will enable its advocates to form some idea of the difficulty of their task.

La Protection Diplomatique et Consulaire dans les échelles du Levant et de Barbarie. By FRANCIS REY. Paris: L. Larose. 1899. 8vo. xxiv and 552 pp. (12 frs.)

THE régime of the capitulations in Turkey and her dependencies has been dealt with by many writers, but they have generally treated the extension of this régime to native protected persons as a matter of minor importance. Mr. Rey has taken it up as an independent subject of inquiry.

The protection of Christians derives its origin from the crusades. At a time when political allegiance was not yet regulated or certified in any precise manner, it is easy to understand that the local authorities in the Eastern Mediterranean would make little distinction between Europeans of different nationalities provided some foreign Consul was prepared to take

them under his protection. France eventually came to be the protector of all Europeans in the Turkish dominions, until capitulations with other Powers placed the subjects of the latter under the protection of their own Government.

Alongside this protection of the European as such grew up a protection of Christians as such, and lastly a protection of certain natives on account of their employment by European Embassies or Consulates. This protection was extended fictitiously and irregularly to subjects of the Porte who came under none of these categories. The treatise before us deals with all these kinds of persons protected by France. Mr. Rey, in a long exhaustive introduction, traces the history of French protection through the Middle Ages and modern times to the present day, and concludes his book with an examination of the legal relationship of protected persons to the Ottoman and to the Consular authorities respectively. There is an excellent appendix of eighteen documents relating to the subject, but no index.

We have also received:—

A Comparative Study of Roman and English Law in the Old World and the New. An address delivered at New Orleans, May 13, 1899, before the Louisiana Bar Association, by the Hon. Hannis Taylor. New Orleans: L. Graham & Son, Lim. 1899. 8vo. 28 pp.—This is a very neatly composed discourse on the lines of what may now be called the orthodox historical school. Mr. Taylor points out, in conclusion, that representative Government and the forms of public law that go along with it are essentially Germanic wherever they occur, being derived either directly or indirectly from the English model. Accordingly the State of Louisiana exhibits an 'outer shell' of Teutonic public law, 'while the private law that dominates within the shell' in Louisiana and other free States which are under the civil law, or some modern system derived from it, is 'almost purely Roman.' Mr. Taylor thinks this the ideal type. Why Roman private law is better than the Common Law is not, to our mind, at all adequately explained. It may be a plausible assumption in Louisiana or in the Province of Quebec: in the birthplace of the Common Law we cannot be expected to receive it uncontested. The tendency to withdraw complicated questions of property and commerce from juries—which exists, by the way, in England as much as in America—is hardly sufficient proof. Mr. Hannis Taylor knows, of course, that the jury is not of Teutonic origin at all, but a transformed exotic.

Mayne's Treatise on Damages. Sixth Edition. By John D. Mayne and Lumley Smith, Q.C. London: Stevens & Haynes. 1899. 8vo. xlv and 671 pp. (28*s.*)—'Mayne on Damages' continues to stand without a rival, in England at any rate, on its own ground. In this edition recent cases have been duly entered, but we do not observe that any substantial alteration has been called for. The problems raised long ago by Mr. Mayne as to the real authority and limits of the rules in *Hadley* v. *Baxendale* are still without an authoritative solution.

Local Government. By William Blake Odgers, Q.C. London: Macmillan & Co., Lim. 1899. Sm. 8vo. x and 284 pp. [In 'English Citizen' series.]—The reconstruction of a large part of our local government system by the Acts of 1888 and 1894 has made it needful to replace Mr. Chalmers's work of 1883 by a substantially new book. Mr. Blake Odgers has done this, to all appearance, as well as it could be done. We

do not pretend to have checked his exposition in detail, but we have not observed any sign of inaccuracy; and the learned author has evidently taken pains to avail himself of the best sources of information in every direction. The book ought to be widely useful, and the only suggestion we have to make is that its utility to lawyers would be increased by the addition of a table of statutes to the next issue.

La Conception Juridique de l'État. By X. S. Combothecra. Paris: L. Larose. London: Stevens & Sons, Lim. 1899. 8vo. 185 pp. (6 frs.)—This book shows a great deal of reading and considerable dialectical ability. As its title indicates, it does not deal with the practical questions connected with the manifestations of the State as a political entity, but solely with the *legal* or, as it should perhaps rather be called, the *philosophical* conception thereof. So far does the author remain aloof from the actual facts of the life of States that he distinguishes Maine's description of State-power as it exists and Mr. Esmein's aspiration towards another and a better condition of things (page 116), and gives his verdict in favour of the latter. Still the writer has read many books (even Austin) and reasons, as a rule, with precision. To the political philosopher the volume will be of value. It has an exhaustive index.

The Law as it affects Cyclists. By Dalzell Chalmers. London: Butterworth & Co. 1899. 8vo. xvi, 88 and 13 pp. (*2s.* net.)—A comprehensive, sensible, and practical handbook. We have observed nothing that seems wrong, and the only omission we regret is that Mr. Chalmers has not given an opinion upon the question, from time to time agitated but, we believe, undecided, whether the rule as to passing other vehicles to the right applies to tramcars: the reason of the rule, namely that the vehicle passed can and should draw in towards the near side of the road, being inapplicable to a car running on fixed rails, and the application of the rule to that case not being without inconvenience.

The Law of Cabs in London (including Motor Cabs). By Herman Cohen. London: Jordan & Sons, Lim. 1899. 8vo. vii and 163 pp. (*2s. 6d.* net).—Mr. Herman Cohen may be congratulated on having produced a complete and practical manual, which will be no less useful to the public at large, and especially temporary visitors to London, than to the profession.

The Yearly Abridgment of Reports, being a full analysis of all cases decided in the superior courts to end of legal year 1897–8, &c. By Arthur Turnour Murray. London: Butterworth & Co. 1899. La. 8vo. xliii pp. 292 columns and Index. (*12s. 6d.*)—We recognize the ingenuity shown in the arrangement of the 'Yearly Abridgment,' and we have nothing but praise for the care and accuracy with which it is compiled: but, as we have said before, we doubt whether the average lawyer will be induced to give up the ordinary digest form of arrangement to which English lawyers have so long been accustomed.

Die Gesetze der Angelsachsen. Ed. F. Liebermann. Vol. I. Part 2. Halle a. S.: Max Niemeyer. 1899. 4to. 191–371 pp.—This issue contains the laws of Edgar, Æthelred, and Cnut, in the English texts and old Latin versions, with a German translation. The next part will deal with anonymous dooms, fragments, common forms, and documents of private origin. Apparently we shall have still some time to wait for Dr. Liebermann's notes.

A Practical Treatise on the Statutes of Limitations in England and Ireland. By J. George N. Darby and F. A. Bosanquet. Second Edition and Supplement by F. A. Bosanquet, Q.C. and J. R. V. Marchant. London: Wm. Clowes & Sons, Lim. Second Edition, 1893, re-issued, with Supplement, 1899. 8vo. xcii and 796 pp., Supplement, viii and 30 pp. (27*s.* 6*d.* The Supplement can be had separately for 2*s.* 6*d.*)—The second edition of this book was favourably noticed in L. Q. R. x. 90. The publishers have now re-issued the work with a Supplement, bringing the case-law on the subject up to date and noticing the statutory alterations made in the law of Limitations affecting particular actions and proceedings. The supplemental notes are concise, and cannot but add to the utility of an already useful work.

The Necessity for Criminal Appeal as illustrated by the Maybrick Case. Edited by J. H. Levy. London: P. S. King & Co. 1899. 8vo. xii and 609 pp. (10*s.* 6*d.*)—Five-sixths of this book consist of a report of the trial of Mrs. Maybrick for murder and of certain evidence collected since the trial. The report purports to be verbatim, but its source is not stated. The remainder of the book contains statements of the practice of various countries with regard to appeals in criminal cases. If these statements are accurate they are not without interest. They have been compiled by several writers, who would appear from their professions and official positions to be competent to write on the topics allotted to them. We ought to add that the editor has written an introduction in which he contends that Mrs. Maybrick was not guilty of murder and is illegally kept in prison.

The Common Form Draftsman: A handbook of Queen's Bench Forms. By E. W. Wild and F. S. Cooper. London: Butterworth & Co. 1899. 8vo. xxiii, 264 and 44 pp. (7*s.* 6*d.* net.)

The Workmen's Compensation Act, 1897, with Notes. By W. Addington Willis. Sixth Edition. London: Butterworth & Co.; Shaw & Sons. 1899. 8vo. xi, 200 and 15 pp. (3*s.* 6*d.* net.)

A Practical Treatise on the Law of Distress for rent and of things damage-feasant, with forms and an appendix of Statutes. By Edward Bullen. Second Edition. By Cyril Dodd, Q.C. and T. J. Bullen. London: Butterworth & Co. 1899. 8vo. lv, 415 and 70 pp.

An Epitome of Real Property Law for the use of Students. By W. H. Hastings Kelke. Second Edition. London: Sweet & Maxwell, Lim. 1899. 8vo. xii and 164 pp. (6*s.*)

The Law relating to Choses in Action, &c. By Walter R. Warren. London: Sweet & Maxwell, Lim. 1899. 8vo. xxxix and 456 pp.

State Trials, Political and Social. Selected by H. L. Stephen. Two vols. London: Duckworth & Co. 1899. 8vo. xiv, 275 and 319 pp. (5*s.* net.)

The Benefices Act and Ecclesiastical Proceedings under the Act and under the Clergy Discipline Acts. By Harold Hardy. London: Jordan & Sons, Lim. 1899. 8vo. xviii and 193 pp. (5*s.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
